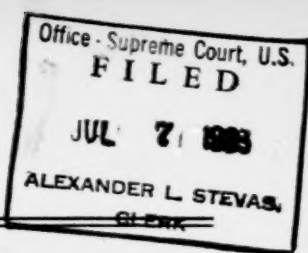


83-103



No.

# In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD and  
LABORERS' INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO, LOCAL 246,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## **QUESTIONS PRESENTED**

1. Whether Section 7 of the National Labor Relations Act protects profane threats by two intoxicated strikers made at the home of a non-striking employee in front of his young daughter and pregnant wife as the National Labor Relations Board holds under its discredited theory that verbal threats lose the protection of the Act only if accompanied by physical acts or gestures.
2. Whether Section 7 of the National Labor Relations Act protects a striking employee's lewd, obscene and insulting remarks directed at and heard by the Company's Industrial Relations Manager in the presence of other employees.
3. Whether a Circuit Court of Appeals may order a company to sign a contract when the Court supplied a missing term to the alleged agreement that was never proposed or accepted by either party, especially when considered with evidence that there were other missing terms and irreconcilable conflicts in several Company proposals on the same matter, all of which the Union claimed to have accepted.



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**RECORD CITATION**

This petition involves issues arising out of the Eleventh Circuit Court of Appeals' enforcement of an order of the National Labor Relations Board. The transcript and exhibits of the initial administrative hearing were certified to the Eleventh Circuit Court of Appeals as Volumes I and II of the Official Record, and are cited in this petition as follows:

"T" refers to the Official Hearings Transcript (Vol. I of the Record on Appeal, No. 81-7852).

"GC" refers to the General Counsel's Exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 81-7852).

"RX" refers to the Company's exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 81-7852).

No.

**In the Supreme Court of the United States**

**October Term, 1983**

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AMERICA, AFL-CIO, LOCAL 246,  
*Respondents.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

The petitioner, Woodkraft Division/Georgia Kraft Company,<sup>1</sup> petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 696 F.2d 921, and is reprinted in the Appendix at pages A1-A22.<sup>2</sup> The decision and order of the National Labor Rela-

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1. The parent companies of Woodkraft Division/Georgia Kraft Company are Time, Inc., Inland Container Corporation and Mead Corporation.

2. References to the opinions below are designated by "A", followed by the appropriate Appendix page number.

tions Board ("Board") and the decision of the Administrative Law Judge ("ALJ") are reported at 258 N.L.R.B. No. 121. The Board's decision is reprinted in the Appendix at pages A25-A47 and relevant portions of the ALJ's decision are reprinted in the Appendix at pages A48-A80.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on January 24, 1983. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on April 8, 1983. This Petition for Writ of Certiorari was filed within ninety (90) days of that date, in accordance with 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **APPLICABLE STATUTORY PROVISIONS**

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following provisions of the National Labor Relations Act ("Act") (29 U.S.C. § 151 et seq.) are set forth in the separately bound Appendix hereto.

1. Section 7 of the Act (29 U.S.C. § 157);
2. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5));
3. Section 8(c) of the Act (29 U.S.C. § 158(c));
4. Section 8(d) of the Act (29 U.S.C. § 158(d));
5. Section 10(e) of the Act (29 U.S.C. § 160(e)); and
6. Section 10(f) of the Act (29 U.S.C. § 160(f)).

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition Below

This Petition involves issues arising out of contract negotiations between Woodkraft Division/Georgia Kraft Company ("Georgia Kraft" or "Company") and Laborers' International Union of North America, AFL-CIO, Local 246 ("Union") during the fall of 1979.

The Union filed charges against the Company alleging the Company violated §§ 8(a)(1), 8(a)(3) and 8(a)(5) of the Act by refusing to execute a collective bargaining agreement and inter alia by discharging certain striking employees for misconduct during the strike.<sup>3</sup>

After a five day hearing the Administrative Law Judge ("ALJ") found that the parties never had a meeting of the minds and had not reached an agreement on a new collective bargaining contract. [A57-A58]. The ALJ also concluded that the Company did not violate the Act in discharging employees Landis Bishop, Jeffrey Hughes and Preston Barlow because their actions were of sufficient gravity to warrant such discipline. [A66, A67, A71-A74].

The NLRB reversed the ALJ's finding that an agreement was reached between the parties and concluded that the misconduct of employees Bishop, Hughes and Barlow was not sufficiently egregious to warrant discharge. [A26-A43].

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3. Twenty-eight employees were named as discriminatees in the original charge. Both the Board and the ALJ upheld the discharge of three of these employees. The Board found that the discharges of the remaining employees violated § 8(a)(1) of the Act, imposed traditional remedies for these violations and dismissed the § 8(a)(3) charges because of no discriminatory motive on the part of the Company. This petition involves those discharges that the ALJ upheld and the Board reversed.



A divided panel of the Eleventh Circuit issued its decision on January 24, 1983 granting enforcement of the Board's Order. [A22].<sup>4</sup> The dissenting judge, in line with the other Circuit Courts of Appeals and consistent with well-established precedent of the Eleventh Circuit, "refuses to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home." [A21].

The Eleventh Circuit denied the petitioner's request for rehearing and suggestion for rehearing en banc on April 8, 1983. [A23-A24].

## **B. Background of Company and Union**

The Company's Greenville, Georgia plant is a saw-mill that produces lumber, wood chips and related by-products. The Union was certified as the exclusive bargaining representative of all production and maintenance employees in September 1977 and the parties negotiated their first collective bargaining agreement effective January 1, 1978 until October 31, 1979.

## **C. The Contract Issue**

The parties began negotiations on a new contract in September, 1979. The Company desired to make a major change in the old contract by establishing work areas, job classifications and specific lines of progression. This required elimination of the old point system under which employees were paid according to the points they earned through qualifying to do certain types of work and seniority. Having earned the points, they were paid on the basis of points and not according to the job they were performing.

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4. Jurisdiction in the Court of Appeals was based on 29 U.S.C. §§ 160(e) and (f).

The Union called a strike beginning on November 15, 1979 with many issues unresolved and when there were no proposals on critical terms of a new contract such as the date the point system ended, the effective date of a new contract and the expiration date of the contract. During the strike many strikers returned to work and negotiations continued. The strike ended on December 10, 1979 when most of the remaining strikers offered to return to work.

On December 3, the Company's negotiator, Mr. Kelly, and a representative for the Union, Mr. Henson, met at the offices of the Federal Mediation and Conciliation Service to negotiate. Mr. Kelly submitted a hand drawn diagram which in general proposed work areas, job classifications, and lines of progression. [GC 19]. At the same meeting, Mr. Kelly presented a list of striking employees that the Company wanted to discipline for misconduct [GC 29], but Mr. Henson refused to discuss it. [A7].

It is undisputed that there was no agreement on a contract by the end of the December 3 meeting.

On December 9, 1979 the Union sent a telegram to the Company stating:

This is to advise you that the last Company offer presented on December 3, 1979, has been accepted as a final and binding contract . . . . [A8, GC 20].

On December 19 the parties met and the Company presented a "Memorandum of Agreement." [A8, GC 22]. The document dealt with unresolved issues that the parties had discussed for some time, including a proposal on disciplining certain strikers and new issues that had arisen because of the strike. It also proposed resolution of conflicts between earlier proposals and the Company's De-

cember 3 proposal dealing with job classifications and lines of progression. The parties were unable to agree on all the items proposed in the Memorandum of Agreement and the Union took the position that there was a contract as of its December 9 telegram.

Subsequently the parties exchanged letters indicating they had not changed their positions. [GC 23-25]. On March 12, 1980 the Union notified the Company that it had prepared an agreement. [GC 26]. The Union repeatedly refused or ignored the Company's requests for a copy of the alleged contract, failed to respond to a Company request to meet and confer and finally cancelled a scheduled meeting. [GC 27, 28; RX 3, 4, 5, 6, 7 and 8]. On July 11, two days before the Administrative Hearing in this case, the Union submitted to the Company a written version of what it believed to be the agreement. [A9, GC 33].

The Eleventh Circuit and the NLRB acknowledge that the Union's version of the December 9 agreement contains discrepancies from the proposals tabled by the Company [A18 and A38] and concluded that it was not the contract. Both held that the Company should have met with the Union and given assistance to reduce the contract to writing.

#### **D. Striker Misconduct Issues**

The Company discharged employees Landis Bishop and Jeffrey Hughes for striker misconduct. The ALJ credited non-striker Walker's testimony that Bishop and Hughes came to his home at night. They were drunk and were cursing him. They told him he was "screwing them out of their G.... damn money by working during the strike." Bishop said he would "take care of him [Walker]"

if he returned to work during the strike. [T 716-718]. This statement was repeated by Hughes. [T 718]. Hughes called him a "sorry mother f.....er." [T 719]. These comments were made on Walker's front porch and in the presence of his young daughter and pregnant wife. [A10; T 717, 718].

The ALJ upheld the discharges finding that "Bishop and Hughes . . . *threatened him with bodily injury if he returned to work.*" [A67; Emphasis added]. The Board overruled the ALJ. The Eleventh Circuit enforced the Board's order and held that the Board's standard for evaluating threats comports with Section 7 of the Act in protecting strike-related conduct. [A20].

The Company discharged Preston D. Barlow on December 20, 1980 for using lewd and abusive language toward Industrial Relations Manager Barbara Lawler while he was on the picket line. The ALJ credited Manager Lawler's testimony that she heard Barlow refer to her as a "bitch," that "f.....ing bitch," "that mother f.....er," and "that ugly bitch" on two occasions in the presence of other employees. [A67; T 799-800]. The ALJ concluded that "Barlow's statements about a supervisor, made within her hearing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge." [A73]. The Board agreed that Barlow's actions were "lewd and insulting" but held they did not warrant discharge. [A42]. The Eleventh Circuit, after characterizing Barlow's comments as "crude and obscene" enforced the Board's order stating, without citation to any authority, that "name calling . . . without more, is privileged . . . under Section 8(c) of the Act." [A10].

## REASONS FOR GRANTING THE WRIT

**I. The Eleventh Circuit's Adoption Of The Board Standard That Verbal Threats, Short Of A Direct Threat Of Immediate Physical Harm, Lose The Protection Of The Act Only When Accompanied By Physical Acts Or Gestures, Presents A Conflict Among The Circuit Courts Of Appeals; Departs From The Accepted Course Of Judicial Proceedings By Failing To Follow Controlling Precedent; And Raises A Significant Issue Concerning The Rights Of Non-Striking Employees To Be Free From Fear And Intimidation Which Should Be Addressed By This Court.**

The new rule announced by a divided panel of the Eleventh Circuit has been expressly rejected by the First and Third Circuits, the only two Circuit Courts to have specifically spoken to the Board's standard. In *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977) and *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977) the courts adopted an objective standard that threats which reasonably instill fear of bodily harm or reasonably intimidate are not protected by Section 7. In addition, a divided panel of the Tenth Circuit Court of Appeals recently avoided adopting or rejecting the Board standard by noting that the employer's refusal to reinstate in that case would not have met the objective standards of the First and Third Circuits either. The dissent argued that the Court should address the issue and clearly adopt the standard set forth by the First and Third Circuits. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982).

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) this Court established that an employer must reinstate

employees who have engaged in an economic strike "unless the employer who refuses to reinstate strikers can show that his action was due to legitimate and substantial business justification." 389 U.S. at 378. In *Fleetwood* this Court also held that it is the primary responsibility of the Board to strike the proper *balance* between the asserted business justifications and the invasion of employees' Section 7 right to organize and strike. 389 U.S. at 378. 29 U.S.C. § 157.

During the fifteen years since this Court last ruled on the reinstatement rights of strikers, the Courts of Appeals have established that strike misconduct constitutes a "legitimate and substantial business justification" for refusing to reinstate a striking employee. See, e.g., *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982); *Associated Grocers v. NLRB*, 562 F.2d 1333 (1st Cir. 1977); *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977). When the misconduct of the striking employees involves threats to non-striking employees, the Board has developed a rule that an employer is not entitled to discharge a striker for threats unless the threats are accompanied by physical acts or violence. See, *A. Duie Pyle, Inc.*, 263 N.L.R.B. No. 92 (1982). This standard is not supported by *Fleetwood* and has never before been accepted by any Circuit Court of Appeals because it absolutely protects threats without balancing the equally important rights of the non-striking employees to be free from fear and intimidation when exercising their Section 7 right to refrain from striking. 29 U.S.C. § 157.

In the case before this Court the ALJ denied reinstatement to Landis Bishop and Jeffrey Hughes after finding that the two intoxicated strikers made a nighttime visit to the home of a non-striking employee, swore at him and threatened him with bodily injury in the presence

of his young daughter and pregnant wife. [A67]. The Board overruled the ALJ finding the threats "to take care of" Walker to be "ambiguous" and not sufficient to warrant discharge since unaccompanied by physical acts or gestures. [A40]. The Eleventh Circuit enforced the Board's Order with a dissent that refused "to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home." [A21-A22].

The Eleventh Circuit's new rule that verbal threats lose the protection of Section 7 rights only when accompanied by physical acts or gestures was rejected by the First Circuit in *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977). In rejecting the Board's theory the First Circuit stated that,

The Board's formula . . . is too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity. A serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker. 562 F.2d at 1336.

The Third Circuit discussed its rejection of the Board's standard as follows:

We recognize that some confrontations between strikers and non-strikers are inevitable and that not every impropriety is grounds for discharge. Moreover, we recognize that it is the primary responsibility of the Board and not the Courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights.' [Citations omitted]. Yet, we do not believe that the employer must countenance conduct that amounts to intimidation and threats of bodily harm. Threats are not



protected conduct under the Act, and we fail to see how a threat acquires protected status simply because it is unaccompanied by physical acts or gestures. The question is whether a threat is sufficiently egregious, not whether there is added emphasis.

*NLRB v. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977). The First and Third Circuits adopted the following standard for determining when misconduct loses the protection of Section 7:

Whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act.

*Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977) quoting *Local 542, Operating Engineers v. NLRB*, 328 F.2d 850, 852-53 (3d Cir. 1963), cert. denied, 379 U.S. 826 (1964). This is an objective test. It is not relevant that no one was in fact coerced or intimidated. The test of coercion and intimidation is not whether the conduct proves effective. *NLRB v. McQuaide, Inc.*, 552 F.2d at 528 (3d Cir. 1977). In adopting this objective test, the Third Circuit rejected other subjective tests that focus on the intent of the striker or the effect on the non-striker. Petitioner urges that this Court reject the Board's discredited standard and adopt the objective standard of the First and Third Circuits.

Under this objective standard it is respectfully suggested this Court should find that the actions of Landis Bishop and Jeffrey Hughes reasonably tended to coerce William Walker in the exercise of his protected right to work during the strike. Certainly under the circumstances Mr. Walker was reasonably in fear of bodily harm and



was reasonably intimidated by Mr. Hughes and Mr. Bishop. Threatening a non-striker with bodily harm at his home at night in the presence of his wife and child are sufficiently egregious circumstances to justify this finding.

The Board's standard should be rejected because it does not follow the balancing rule announced in *Fleetwood* and because threats are not protected conduct under Section 7 of the Act. Furthermore, the Eleventh Circuit's adoption of the standard presents a clear conflict among the Circuit Courts of Appeals.

Petitioner respectfully requests that the conflict between the Circuits on this important issue of striker discipline justifies the grant of certiorari to review the judgment below, and to consider the validity of the Board's discredited standard for evaluating threats.

In addition, the Eleventh Circuit's decision departs from the accepted course of judicial conduct by failing to follow controlling precedent. Prior to the decision in this case the Fifth Circuit repeatedly refused to endorse the Board's efforts to characterize obviously threatening remarks as ambiguous.<sup>5</sup> In *NLRB v. Moore Business Forms*, the Fifth Circuit refused to enforce a Board order to reinstate a striking employee who retorted, "There's ways to keep you from it" when a non-striking employee informed him that he was going to work. This encounter took place in the daytime at the plant site and there was no allegation that the remark was accompanied by any physical act or gesture. In refusing to enforce this order, the Fifth Circuit specifically rejected the Board's characterization of this obviously threatening comment as

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5. The decisions of the United States Court of Appeals for the Fifth Circuit handed down by that Court prior to the close of business on September 30, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (1981).

"ambiguous." The Eleventh Circuit distinguishes *Moore Business Forms* from this case on the meritless ground that the record in this case shows that violent acts were only committed against property and not against persons. This after-the-fact distinction is incorrect and is little comfort to the person being threatened at home by two intoxicated strikers. The ALJ specifically found there were widespread acts of violence including rock throwing and pointing a gun at the plant manager. The ALJ noted the Company had a genuine problem that culminated in a state court injunction. [A70].

In *Firestone Tire & Rubber Co.*, 449 F.2d 511 (5th Cir. 1971), a striking employee approached the car of a non-striking employee as he crossed the picket line and began to curse him and told him that if he "did anything he was going to get my . . . ass." The non-striking employee's wife and child were with him in the car. The trial examiner concluded that this was a threat of physical harm and constituted serious misconduct warranting termination. Typically, the Board disagreed with the trial examiner's conclusion and characterized the remark as "vague and ambiguous." In denying the enforcement the Fifth Circuit acknowledged the circumscribed review allowed by *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), but stated simply, "We are unable to find substantive evidence to justify the Board's interpretation—in opposition to its Trial Examiner—of Whitehead's remarks and related activities." 449 F.2d at 512.

The petitioner respectfully requests that this Court decide that striking employees lose the protection of the Act when they threaten non-striking employees with a threat that reasonably tends to create a fear of physical harm or reasonably coerces and intimidates non-striking employees.

**II. The Eleventh Circuit's Decision That Crude And Obscene Remarks Directed At And Heard By A Female Management Executive Are Privileged Under The Free Speech Provisions Of Section 8(c) Of The Act States A Patently Erroneous Rule Of Law; Fails To Follow Controlling Precedent; And Fails To Balance The Employer's Right To Maintain Order And Respect.**

The Eleventh Circuit's Decision, after characterizing Preston Barlow's comments as "crude and obscene" states *without citation* that "name-calling . . . without more, is privileged under the free speech provisions of Section 8(c) of the Act. 29 U.S.C. § 158(c)." [A21].

However, Section 8(c) does not create any rights for employees and does not provide any protection for strike misconduct. A striking employee's misconduct is protected, if at all, under Section 7 of the Act. Section 8(c) on its face guarantees that an expression of opinion which is free from threats of reprisal or force or promise of benefits "shall not constitute evidence of an unfair labor practice" against the party expressing the opinion. 29 U.S.C. § 158(c). Since only companies and unions can commit unfair labor practices, Section 8(c) applies only to them. Such an erroneous and unsubstantiated construction of the Statute clearly warrants review by this Court.

In addition, Barlow's conduct is not protected by Section 7 of the Act. 29 U.S.C. § 157. The ALJ found that on one occasion Preston D. Barlow screamed at Barbara Lawler, the plant's Labor Relations Manager while she was leaving the plant, "that f..... bitch," and "that mother f....., that ugly bitch." This happened in the presence of other employees. On another occasion, he yelled at Mrs. Lawler, "that ugly bitch." [A67]. The ALJ concluded that "Barlow's statements about a supervisor, made within her hear-

ing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge." [A73]. The Board agreed that Barlow's actions were "lewd and insulting" but the Board held such actions did not warrant discipline. [A42].

By enforcing the Board's Order, the Eleventh Circuit announces a new law that allows and encourages a striking employee to hurl vile comments at a management employee in front of other employees with complete impunity even when there is no provocation.

Prior to the Eleventh Circuit's decision, the Fifth Circuit's rule had long been that "an employee may not act with impunity even though he is engaged in protected activity." *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970). In *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968) the Court refused to enforce a Board order to reinstate an employee who was discharged for calling the plant manager a "Castro" during the protected activity of a grievance meeting. The Court stated that,

Undoubtedly flagrant conduct of an employee even though occurring in the course of Section 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. 395 F.2d at 514. [Emphasis added].

Although the responsibility to draw the line between the conflicting rights rests with the Board, *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 730 (5th Cir.

1970), the Board's rule falls short of any balance in that it grants full immunity to strikers to direct abusive language without any regard for the right of non-strikers. This rule is not compatible with the precedent of the Eleventh Circuit or with Section 7 of the Act.

Aside from the business justification of not affording protection to strikers who use abusive language toward superiors as discussed above, this Court should be concerned about the Board's and Eleventh Circuit's absolute holding that any and all abusive language used by a striker is protected by Section 7 of the Act. In *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), this Court held:

. . . [P]etitioners urge that all this abusive language was protected and that they could not, therefore, be enjoined from using it. We cannot agree. Words can readily be so coupled with conduct as to provoke violence . . . . 355 U.S. at 138.

This Court held there that the State of Arkansas had the right to enjoin abusive language that was calculated to provoke violence or was likely to do so. Very rarely could language such as used by Mr. Barlow be used by strikers against non-strikers without provoking violence. Certainly in all instances where such abusive language is used, the likelihood of violence ensuing is substantial.

How can the Board's broad, open-ended standard of affording protection to all abusive language used by strikers be balanced with this Court's decision in *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957)? It is quite an anomaly to have the Board and the Eleventh Circuit saying that strikers are protected by federal law in using any sort of abusive language and the Supreme Court saying a state may enjoin a striker for using abusive language that may provoke violence.

Only this Court can resolve this dilemma by establishing the proper standard which strikes the balance for all legitimate interests. Petitioner respectfully suggests that this is sufficiently important as to warrant review by this Court.

**III. The Eleventh Circuit's Decision Which Supplies A Missing Term To The Alleged "Agreement" Between The Parties Is In Direct Conflict With This Court's Decisions In *H. K. Porter v. NLRB*, 397 U.S. 99 (1977) And *NLRB v. American Insurance Co.*, 343 U.S. 395 (1952).**

In *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Supreme Court made clear that the NLRB cannot require the parties to agree to a specific term. The Court stated,

While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone *without any official compulsion over the actual terms of the contract.* 397 U.S. at 108. [Emphasis added].

In *NLRB v. American Insurance Co.*, 343 U.S. 395, (1952) this Court in discussing employers' and employees' duty to bargain in good faith, stated that it is "clear that the Board may not either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." 343 U.S. at 404. [Emphasis added].

The Eleventh Circuit opinion directly conflicts with the decisions of the Supreme Court by adding a term to the alleged agreement that was never proposed by the

Company, the Union, or even the Board. *H. K. Porter v. NLRB*, 397 U.S. 99 (1970); *NLRB v. American Insurance Co.*, 343 U.S. 395 (1952). 29 U.S.C. § 158(d).

Throughout this proceeding the Company has consistently argued that, in addition to other key terms of the contract, the parties had never agreed on an effective date. It is undisputed that at the time of the Union's December 9 telegram neither the Company nor the Union had ever proposed an effective date for the contract. There were no proposals by either party—and hence no agreement—prior to the strike. There were no proposals by either party—hence no agreement—prior to the Union's telegram. The Company first proposed an effective date in a December 19 Memorandum of Agreement [GC 22], ten days after the date the Board found a contract was created. In this Memorandum the Company proposed November 1, 1979. Based on this subsequent proposal, the Board speculated that the parties had not contemplated a hiatus between the old and new contracts. [A35]. The Company notes that particularly when a strike has occurred, the effective date of a contract is frequently a significant item of dispute between the parties and is subject to many proposals and counter proposals.

Incredibly, the Eleventh Circuit not only granted enforcement of the Board order to execute a contract without an effective date but actually supplied an effective date of November 15, 1979 in Footnote 8 of its Opinion. [A17, A18]. Neither the Company nor the Union ever proposed or agreed to that date. Supplying missing terms to a contract is in direct conflict with the well-established law that the Board cannot force an employer or a union to sign a contract to which it has not agreed, 29 U.S.C. § 158(d), *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v.*



*American Insurance Co.*, 343 U.S. 395, 404 (1952). The Eleventh Circuit clearly does not have the authority to supply a missing term to a labor agreement and its actions in doing so warrant review by this Court.

Furthermore, the Eleventh Circuit panel's decision directly conflicts with *NLRB v. Downs-Clark, Inc.*, 479 F.2d 546 (5th Cir. 1973) where the Fifth Circuit refused to enforce a Board order to execute a contract where the parties had not agreed to wages and neither party had proposed an effective date or duration for the contract. The Court stated,

The parties had not reached their express intention to arrive at a complete, integral agreement. While a labor contract is *sui generis*, like commercial or other contracts it comes into being with binding effect *only after there has been a meeting of the minds by the contracting parties on a complete agreement.* 479 F.2d at 548 [Emphasis added].

In the case before this Court the written proposals did not contain an effective date, duration, a date when wages would go into effect for each subsequent year of the contract and wage rates applicable to employees who would be temporarily assigned to higher paying jobs. Also, there was no agreement on some of the elements of the wage package.

In addition to missing terms, there were unresolved conflicting terms especially in Articles 5 and 11 of the alleged agreement. The Union's negotiator produced an alleged thirty-two page "contract" at the hearing and testified item by item that the Union had agreed to each and every one. [T 61-91]. However, that document clearly conflicts with the Company's proposals on permanent promotion and transfer procedures [A38 n.9; GC 33 p.4; RX



18], lateral bidding within area job classifications [GC 19, item 5, Promotions: GC 33 p.4], temporary shift assignments [A38 n.9; RX 19; GC 33 p.5], reductions in workforce [RX 17; GC 19, 33 p.5; T 403-404], and temporary vacancies [RX 20, 21, 22; GC 33 p.11]. The Eleventh Circuit and the Board both acknowledge these discrepancies but try to obscure them by claiming they result from the Company's refusal to assist in reducing the contract to writing. [A18; A39]. The problem with this argument is that there have never been any proposals made on how to resolve these discrepancies because of the Union's adamant position that there had been agreement upon all terms. The Eleventh Circuit rather disingenuously claims that the Board did not require the Company to execute the Union's document "but rather a contract embodying the agreement reached between the parties on December 9." [A18]. However, if the contract had been made on December 9, as the Board and the Eleventh Circuit found, it would have been impossible for the parties to meet and make proposals to resolve the conflicts. The Order is unenforceable because the parties have never reached an agreement on the Articles containing the significant discrepancies which the Board and Eleventh Circuit insist on ignoring.

In addition, the Eleventh Circuit applied irrelevant precedent to the facts of the case; *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981). *Pepsi-Cola* stands for the proposition that offers made during collective bargaining negotiations are not terminated by a rejection or counter proposal and remain viable unless specifically withdrawn. The Company points out that this is not a case where the employer sought to withdraw a full contract proposal. The Company has never contended that its proposals were not viable and agrees that all Company proposals were still on the table when the Union sent its tele-

gram on December 9. The reason there was not a contract was because there were absolutely no proposals on several indispensable terms of the contract and there were direct conflicts in some of the proposals with other proposals on the same terms and with the terms selected by the Union in its version of the alleged agreement. In similar circumstances the Sixth Circuit recently declined to enforce a Board order to execute a written contract stating simply,

Discrepancies between notations made by Orrin [Employer's negotiator] and the agreement in its final form are too apparent to satisfy us that certain substantive terms in the contract are reflective of agreements made during the bargaining session.

*NLRB v. International Credit Service*, 651 F.2d 1172, 1174 (6th Cir. 1982).

Both the Board and the Eleventh Circuit refused to consider the significant discrepancies in the Union's version of the contract and the Company's proposals as evidence that there was no agreement. In view of Barnes' explicit testimony that he had agreed to each article in it, these discrepancies cannot be ignored. The Union's December 9 telegram purported to accept the Company's last proposal on December 3. However, their "agreement" selects language from some earlier proposals and omits some language from the December 3 proposal.

It is respectfully submitted that in light of these omissions and discrepancies, the Eleventh Circuit's conclusion that the Board's findings were supported by substantial evidence is incorrect and should be carefully reviewed. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Petitioner respectfully submits that the Eleventh Circuit has failed to follow the clear and well-established precedent of this Court and for this reason further review is warranted.

### CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

J. ROY WEATHERSBY

*Counsel for Petitioner*

Of Counsel:

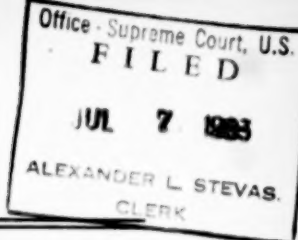
POWELL, GOLDSTEIN, FRAZER & MURPHY

1100 C&S National Bank Building

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No.

# In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION / GEORGIA KRAFT COMPANY,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD and  
LABORERS' INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO, LOCAL 246,

*Respondents.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 81-7852

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WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent.

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

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Argued August 31, 1982  
Decided January 24, 1983

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Before Kravitch, Hatchett and Clark,  
Circuit Judges

---

J. Roy Weathersby (John N. Raudabaugh,  
Dara L. DeHaven, and Powell, Goldstein,  
Frazer & Murphy, on brief), Atlanta,  
Ga., for petitioner.

James Y. Callear (William A. Lubbers,  
General Counsel, John E. Higgins, Jr.,  
Deputy General Counsel, Robert E. Allen,  
Associate General Counsel, Elliott Moore,  
Deputy Associate General Counsel, and  
John D. Burgoyne, Assistant General  
Counsel, on brief), for respondent.

Employer sought review of NLRB order and NLRB sought enforcement. The Court of Appeals Hatchett, Circuit Judge, held that: (1) substantial evidence sustained finding that collective bargaining agreement had been arrived at, and (2) verbal threats made by two employees to a third employee, who was continuing to work, and obscene and crude remarks directed at female management executive as she crossed the picket line did not warrant termination of the offending employees.

Enforcement granted.

Clark, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Labor Relations (Key) 680

In reviewing an order of the NLRB, court is bound by the Board's factual findings if they are supported by substantial evidence on the record considered as a whole.

2. Labor Relations (Key) 679

Where NLRB does not accept ALJ's findings, court's examination of the Board's findings must be especially critical.

3. Labor Relations (Key) 679

Disagreement between NLRB and ALJ on factual inferences and legal conclusions does not detract from the substantiality of the evidence which must support the Board's decision and it does not modify the appropriate standard of review in the courts.

4. Labor Relations (Key) 246

Where company did not indicate at any point during negotiations that a new contract was contingent upon reso-

lution of striker discipline issue and where company's purpose in raising the matter was to give the union notice of its proposed action, fact that company had not decided on severity of discipline to be imposed did not preclude a finding that a collective bargaining agreement had been reached by union's acceptance of company's last offer.

5. Labor Relations (Key) 246

Fact that union originally rejected proposals which it later accepted was irrelevant to issue of whether collective bargaining agreement had been reached.

6. Labor Relations (Key) 555

Evidence sustained finding of NLRB that all of employer's proposals were viable at the time that they were accepted by union.

7. Labor Relations (Key) 246

Where neither employer nor union sought to disrupt the continuity between existing contract and the new one, determination of effective date of new agreement following strike did not preclude finding that collective bargaining agreement had been arrived at by union's acceptance of employer's last proposal.

8. Labor Relations (Key) 246

Discrepancies between last proposal made by employer and document prepared by the union embodying the agreement between the parties did not preclude a finding that an agreement had been reached where the discrepancies resulted from the employer's refusal to assist the union in reducing the agreement to writing.



## 9. Labor Relations (Key) 379

Economic strikers retain their employee status and, upon an unconditional application to return to work, must be reinstated if former or substantially equivalent positions are available.

## 10. Labor Relations (Key) 538

Employer's refusal to reinstate economic strikers is deemed presumptively discriminatory, but employer may rebut the presumption by demonstrating that the employee engaged in misconduct during the strike falling outside the statutory protections.

## 11. Labor Relations (Key) 304

NLRB standard that verbal threats, short of a direct threat of immediate physical harm, lose protection of the National Labor Relations Act only when accompanied by physical acts or gestures is consistent with the Act. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

## 12. Labor Relations (Key) 376

Actions of two striking employees in going to the home of a third employee who was continuing to work and stating that the working employee would be "taken care of" was not sufficient to justify their termination from employment. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

## 13. Labor Relations (Key) 304, 376

Employee's crude and obscene remarks directed at female management executive as she crossed the picket line did not warrant his termination; verbal obscenities which

accompany threats of physical harm constitute serious misconduct and are not protected by the National Labor Relations Act but name calling, without more, is privileged under the free speech provisions of the Act. National Labor Relations Act, § 8(c), as amended, 29 U.S.C.A. § 158(c).

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Powell, Goldstein, Frazer, & Murphy, J. Roy Weathersby, Atlanta, Ga., for petitioner, cross-respondent.

James Callear, Washington, D.C., for respondent, cross-petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

HATCHETT, Circuit Judge:

In this case we decide that substantial evidence supports enforcement of the National Labor Relations Board's ("Board") findings of unfair labor practices by Georgia Kraft Company, Woodkraft Division ("Georgia Kraft" or "Company") arising out of collective bargaining negotiations and the improper termination of striking employees.

## I. BACKGROUND

Georgia Kraft is an industrial timber company specializing in the production of lumber, wood chips, paper, and related by-products. This appeal concerns the Company's Greenville, Georgia lumber mill, where, in September, 1977, International Laborer's Union, Local #246 was certified as the exclusive collective bargaining representative of all production and maintenance employees.

### A. Contract Negotiations

Pursuant to the terms of the parties' existing collective bargaining agreement, the Union notified the Company in July, 1979, of its desire to renegotiate the agreement. Beginning on September 11, 1979, and on various other dates over the next three months, the parties met to negotiate the terms of a new agreement. Broughton Kelly, Director of Labor Relations, represented the Company throughout the negotiations, and Charles R. Barnes, Business Manager for the Union's district council, represented the Union during the first four bargaining sessions. Howard Henson, the Union's regional manager, represented the Union at sessions held on November 29, and December 3, 1979.

At the first meeting on September 11, the Union submitted proposals of desired changes in the existing agreement. At subsequent meetings, the Company responded to the Union's proposals by either agreeing, insisting that the current contract's provisions remain the same, or proposing changes of its own.<sup>1</sup> Failing to reach an agreement by October 31, the expiration date of the existing contract, the Company and the Union agreed to extend the contract until November 15. When no substantial progress resulted from a brief meeting on November 14, the Union voted to strike the following day. On November 15, all bargaining employees walked off their jobs and established a picket line outside the plant.

On November 27, the parties met and reached agreement on some issues; many provisions, however, remained

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1. The Company asserted its position by submitting individual provisions rather than an integrated document. Some of the Company's proposals were handwritten, some typed. As the Board's order notes, "bargaining was not a model of neatness and organization."

unsettled. From the beginning of negotiations, the Company sought elimination of the plant's point system and the establishment of area job classifications and lines of progression in order to diminish lateral movement. Under the point system, each employee was placed in a job classification/pay grade. Each grade had a certain number of points related to the grade. These points entitled the employee to a certain rate of pay. The individual job functions within each department at the plant were assigned points relating to the job. As an employee learned new jobs, he or she received credit for the points assigned to that particular job. The Company disliked this system because seventy-five percent of the employees at the plant had accumulated the total amount of points available within his or her respective department. Accordingly, wages at the Greenville mill were remarkably higher than at other mills.

The Union and Company representatives met again on November 29, at the office of the Federal Mediation and Conciliation Service in Atlanta. Despite the presence of Henson, the Union's regional manager, no significant progress resulted. At a December 3 meeting between Kelly and Henson, Henson presented Kelly with the Union's wage proposal and Kelly gave Henson a Company proposal concerning seniority, departmental point systems, and lines of progression. This was the Company's third such proposal regarding these subjects. Because he was not authorized to make specific concessions, Henson stated that he would take the Company's proposals back to the Union's negotiating committee. At the end of this meeting, Kelly handed Henson a list of striking employees whom the Company planned to discipline because of alleged misconduct during the strike. Henson refused to discuss the striker discipline issue, taking the position that it was a matter between the local union and the Company.

On December 9, the Union's negotiating committee voted to accept the Company's proposals on all unsettled contract provisions and sent the Company the following telegram:

This is to advise you that the last company offer presented on December 3, 1979, has been accepted as a final and binding contract[.] All employees who could be contacted will return back to work on their regularly assigned shifts effective December 10, 1979[.] We are prepared to meet at your convenience to sign the agreement[.]

Tommy L. Williams Business Manager Local Union 246.

As promised, the strike ended the following day. Kelly notified the Union by letter on December 11, that several matters required resolution before an agreement could be finalized. On the same day, Barnes sent Kelly a letter requesting a meeting in order to finalize the language and sign the agreement. At a meeting on December 19, Kelly presented to Barnes a document entitled "Memorandum of Agreement." This document contained proposals agreed to by the Union's December 9 telegram and a number of strike-related proposals. One such provision called for the termination of twenty-five employees for misconduct and provided that "such terminations are final and binding on the Union." Another provision required the Union to agree to withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts against the Company or its employees." Barnes acknowledged the Union's agreement on most of the provisions contained in the memorandum, but refused to sign the document because of the inclusion of those provisions regarding strike-related matters and the termination of certain employees.

Until March of 1980, the parties' contacts consisted primarily of Company allegations that specific matters remained unsettled and the Union's counter that it was prepared to sign an agreement as soon as possible. In a March 3 letter to the Union, Kelly strenuously denied that a collective bargaining agreement had been reached and that, in any event, the Union had failed to submit any document which the Company could sign. On March 12, the Union notified the Company that the collective bargaining agreement was typed and ready to be executed and requested a date to meet and sign the agreement. Kelly replied on March 14 by requesting a copy of the alleged agreement and stated that the Company's position remained the same. Subsequent requests by the Company for a copy of the alleged agreement were denied or unanswered, and scheduled meetings were postponed. On July 11, some four months after the agreement was typed and ready for execution, the Union submitted to the Company a draft of what was agreed to on December 9.

*B. Termination of Certain Striking  
Employees*

At the conclusion of the strike, twenty-eight strikers who reported to the plant for duty were not put back to work. The Company notified twenty-five of those twenty-eight that they had been terminated for alleged misconduct. Among those discharged were Landis Bishop, Jeffrey Hughes, and Preston Barlow.

The Company's separation notices to Bishop and Hughes state that they were discharged for visiting the home of a non-striking employee and threatening his family and property. The non-striking employee, William Walker, testified that Bishop and Hughes came to his home one night during the strike to find out why he had re-

turned to work and was not on the picket lines. Walker, claiming that Bishop and Hughes reeked of liquor, replied that he reported to work because he needed the money. He further testified that Bishop and Hughes made vulgar comments in the presence of his young daughter and pregnant wife.<sup>2</sup>

The Company discharged Preston Barlow for directing vulgar language at Industrial Relations Manager Barbara Lawler while Barlow was on the picket line. Lawler testified that while crossing the picket line in her car on two occasions, Barlow shouted obscene remarks as she passed the picketing employees.<sup>3</sup>

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2. Walker testified on direct examination as follows:

They was standing in there and they was—let's see, it was Landis Bishop. Bishop told me that if I returned to work that he would take care of me and I asked him what he meant by that and he started laughing and Jeff said, "yeah, we'll take care of you." I asked them—I said, "what do you mean by that?" I repeatedly was asking him and he was talking about that I shouldn't have been crossing the picket line and Jeff Hughes called me a "sorry mother fucker" for taking their money away from them. My little girl was standing right beside me. I couldn't leave them and try to get her out of the room.

3. Lawler's testimony is as follows:

Then, he started to—he kind of turned and he was turning, but as he turned around and circled and then I heard "that mother fucker, that ugly bitch," and two of the employees standing next to him—I can't recall because I really was not paying any further attention than what I just told you—and they turned around as he was saying this and kind of looked off to the side; . . . .

It wasn't too long after that time, my guesstimate somewhere around a week or maybe a little more—I know there was the same people there. It was early in the morning and I was coming into work and Doug was on picket duty because he did have a sign. As I went through, he directed some more abusive language and it was something along that line of "the bitch" or something like that. I can't recall, but it was, again, directed at me.

C. *Proceedings Below*

The Union filed complaints with the Board alleging, among other things, that the Company violated sections 8(a) (1), (3), and (5), of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a) (1), (3), and (5), by refusing to execute a collective bargaining agreement on which the parties had agreed and by discharging and thereafter failing to reinstate certain employees for alleged misconduct occurring during the strike.<sup>4</sup> At a hearing on these complaints, the administrative law judge (ALJ) found that the parties had not reached an agreement on a new collective bargaining contract, and therefore, the Company had not violated section 8(a) (5) of the Act. The ALJ found that the major impediment to an agreement was the issue of striker discipline. Regarding the December 3 negotiations between Henson and Kelly, the ALJ found that Kelly raised the issue as a contractual proposal. Because Henson refused to discuss this issue, the ALJ found that the parties had failed to reach a meeting of the minds. Finally, the ALJ concluded that the Company did not violate section 8(a) (1) of the Act in discharging Bishop, Hughes, and Barlow because their actions were of sufficient gravity to warrant such discipline.

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4. Title 29 U.S.C.A. § 158(a) provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.



Contrary to the ALJ, the Board found that a collective bargaining agreement had been reached on December 9 when the Union sent its telegram accepting the Company's last offer. The Board found that the Company did not raise striker discipline as a bargainable issue at the December 3 negotiating session, nor make it a condition to the resolution of an agreement. Interpreting the Company's December 19 "Memorandum of Agreement" as introducing new contingencies in the negotiations in order to buttress its position that no agreement had been reached, the Board found that the Company, by refusing to acknowledge the agreement and assist the Union in reducing the agreement to writing, had obstructed and frustrated the bargaining process. The Board also concluded that the Company violated section 8(a) (1) of the Act in that the actions of Bishop, Hughes, and Barlow were not sufficiently egregious to warrant their discharge.

## II. ISSUES

Georgia Kraft's petition raises two issues: (1) whether substantial evidence in the record as a whole supports the Board's finding that Georgia Kraft and the Union reached an agreement on a collective bargaining contract; and (2) whether the Board erred as a matter of law in finding that the actions of Bishop, Hughes, and Barlow did not warrant termination.

## III. DISCUSSION

### A. *Collective Bargaining: Was an Agreement Reached?*

Georgia Kraft contends that no agreement was reached via the Union's telegram because of the Union's previous refusal to discuss striker discipline. Further, even if the Union's rejection of the December 3 proposal on striker dis-

cipline is not an obstacle to a collective bargaining agreement, the telegram still fails to constitute an adequate acceptance. Other significant issues such as wages, effective date of the contract, seniority provisions, permanent promotions and transfer provisions, temporary assignments, and temporary vacancies remained unsettled. The Board claims that the evidence of record does not support either of the Company's contentions. According to the Board, the issue of striker discipline was not presented as a negotiable proposal on December 3, nor was it an issue upon which resolution of a collective bargaining agreement was contingent.

The evidence presented to the ALJ on this issue consists only of Kelly's testimony and the parties' stipulation to Henson's testimony. On direct examination, Kelly explained that the reason for giving Henson the list was to "advise [the Union] about the situation with these employees" and "inform [Henson] of the conduct of these people . . . that we intended to terminate." When asked if he wished to bargain over the list of employees, Kelly replied that "the subject was opened [sic] to bargain if [Henson] had some specific request in regard to the people." When asked a second time if he wished to bargain about the list of strikers, Kelly responded:

No, not specifically. As I gave Mr. Henson that particular piece of paper, his reaction . . . was that he did not want to get involved with the termination of any strikers, and that the International Union was withdrawing from the negotiations. We really didn't discuss that at all. We took that position right off.

Kelly further testified that he gave the list after the parties had discussed each others' proposals, and that he told Henson it was the Company's position that some form of dis-

disciplinary action was justified for the employees on the list.<sup>5</sup> Based on this evidence, the ALJ reasoned that the Company submitted the striker discipline issue as a matter to be resolved by contract. Because the Union refused to discuss the issue, and did not intend to accept any proposal on discipline in the December 9 telegram, the ALJ concluded that no agreement had been reached.

[1, 2] In reviewing an order of the National Labor Relations Board, we are bound by the Board's factual findings if they are supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464-465, 95 L.Ed. 456 (1951); *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 487 (11th Cir.1982). In those cases where the Board does not accept the ALJ's findings, however, this court's examination of the Board's findings must be especially critical. *NLRB v. Datapoint Corp.*, 642 F.2d 123, 126 (5th Cir.1981); *Synco Corp. v. NLRB*, 597 F.2d 922, 924-25 (5th Cir.1979). "Particular scrutiny is appropriate where the Board disagrees with some of the credibility choices made by the judge who had the opportunity to see and question the witnesses himself." *Datapoint*, 642 F.2d at 126.

[3] Contrary to Georgia Kraft's contentions, the Board did not reject credibility determinations made by the ALJ in this case. See *NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222, 1224 (5th Cir.1980). Compare *NLRB v. Datapoint Corp.*, 642 F.2d at 126 (differences between Board and ALJ

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5. The parties stipulated that Henson would have testified as follows:

Kelly said that he did not want to deceive me and handed me another piece of paper . . . with names of people that the Company intended to fire. I told Kelly the meeting was over and I would not discuss anything about firing strikers. At no time during this meeting did Kelly say anything about any other areas that the parties may have discussed before.

rested on both credibility determinations and conclusions of law); *Sincro Corp. v. NLRB*, 597 F.2d at 925 (ALJ possesses superior advantage in evaluating credibility of witnesses' record testimony). Rather, this case involves "a difference in overall judgment as to proper inferences to be drawn from largely undisputed evidence" between the Board and the ALJ. *NLRB v. Florida Medical Center, Inc.*, 576 F.2d 666, 674 (5th Cir.1978). Accordingly, we find that the Board did not discredit Kelly's testimony, but rather rejected the ALJ's conclusions as to the inferences to be drawn from Kelly's testimony and Henson's stipulated testimony. A disagreement between the Board and the ALJ on factual inferences and legal conclusions does not detract from the substantiality of the evidence that must support the Board's decision, nor does it modify the appropriate standard of review in this court. See *Universal Camera*, 340 U.S. at 496, 71 S.Ct. at 468-469.

[4] We agree with the Board that the striker discipline issue was not a bargainable topic in need of resolution before a collective bargaining agreement could be reached. At no point during negotiations did the Company indicate that a new contract was contingent upon resolution of this issue. Although bargainable in the sense that the Company had not decided on the severity of discipline by the December 3 meeting, the uncontroverted evidence reflects that the Company's purpose in raising the matter was to give the Union notice of its proposed action.<sup>6</sup> Be-

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6. Kelly's testimony supports this conclusion. In response to questioning by his counsel on direct examination regarding whether the Company intended to bargain with Henson about the list, Kelly replied:

Yes, we could have. I told him the title we put at the top of the thing, "People To Be Terminated," but during a meeting when I talked to him, I didn't say the people were absolutely fired and were never going to come back. I said that some disciplinary action is justified.

cause it was never intended to be a contractual provision, striker discipline was not, contrary to the ALJ's holding, an impediment to a collective bargaining agreement.

Finding that the striker discipline issue was injected into the negotiation process on December 3 as a contractual proposal, the ALJ deemed it unnecessary to consider whether other contractual issues remained unresolved. Thus, it was necessary for the Board to examine the contractual proposals outstanding as of the December 3 session to determine whether an agreement was indeed obtainable. The Board concluded that when the Union telegraphed its acceptance on December 9, a binding contract was formed and the Company's notification on December 11 that it was not prepared to execute a collective bargaining agreement constituted a violation of section 8(a)(5) of the Act.

[5] After three months of negotiations, the parties' stance on various contractual issues had become fixed. Thus, by December 3, the Company had specific positions on such issues as seniority, departmental point systems, contract duration, and wages.<sup>7</sup> Barnes testified that, by its December 9 telegram, the Union accepted the most recent Company proposals on undecided issues and withdrew all outstanding proposals of the Union. Therefore, the Board found it necessary to determine initially whether the Company's offers in the disputed areas were still viable as of December 9. See *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981). The Board found that as of December 9, all contractual provisions were the subject of specific proposals and had not been withdrawn prior to the

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7. Effective November 19, 1979, the Company implemented the terms of its last economic offer made to the Union, the offer ultimately accepted by the December 9 telegram. This wage offer clearly reflects that the Company contemplated a contract of three years' duration.

Union's December 9 acceptance. That the Union originally rejected proposals is irrelevant. In the collective bargaining setting

A contract offer is not automatically terminated by the other party's rejection or counterproposal, but may be accepted within a reasonable time unless it was expressly withdrawn prior to acceptance, was expressly made contingent upon some condition subsequent, or was made subject to intervening circumstances which ma[k]e it unfair to hold the offeror to his bargain.

*Pepsi-Cola Bottling*, 659 F.2d at 89-90 (footnote omitted).

[6, 7] The Board's decision to determine the viability of all proposals was entirely appropriate. Because Barnes' testimony clarified what the Union was accepting, the only remaining question was whether the Company's proposals were still viable. As for the effective date of the new agreement, neither the Company nor the Union sought to disrupt the continuity between the existing contract and the new one. The Company's December 19 "Memorandum of Agreement" calls for an effective date of November 1, 1979, and neither party has objected to this date.\*

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8. Georgia Kraft argues that the Board's order signifies an effective date of December 9, the Union's acceptance date. We read the order as holding otherwise. The Board stated that

the record reflects that the old contract expired on October 31, and that, throughout negotiations, neither side had articulated any proposal that would break the continuity between the expired contract and the new one. Indeed, that [the Company] contemplated no such hiatus is obvious from its December 19 "Memorandum of Agreement," which calls for an effective date of November 1.

As indicated earlier, by agreement of the parties, the expiration date of the existing date was extended from November 1 to

(Continued on following page)

[8] Georgia Kraft calls our attention to the fact that the document prepared by the Union and submitted to the Company contains discrepancies from the proposals tabled by the Company and agreed to by the Union on December 9. According to the Company, these discrepancies reinforce the argument that an agreement was never reached. We disagree. The Board has not required the Company to execute the Union's document, but rather a contract embodying the agreement reached between the parties on December 9. The Company is therefore required only to execute an agreement that accurately reflects the most recent proposals accepted by the Union in its December 9 telegram. The Board found discrepancies in the Union's document resulting not from lack of agreement, but due to the Company's refusal to assist the Union in reducing the agreement to writing prior to the resolution of the strike-related issues. We find no error in this ruling. Simply put, the variations between the document as drafted and the December 9 agreement are no defense to the enforcement of the Board's order.

#### *B. Discharge of Striking Employees*

[9, 10] Economic strikers such as Bishop, Hughes, and Barlow, retain their employee status and, upon an unconditional application to return to work, must be reinstated if former or substantially equivalent positions are available. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-79, 88 S.Ct. 543, 545-546 (1967); *C.H. Guenther &*

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Footnote continued—

November 15, 1979. The Company notified the Union on November 16 that it would implement its new wage proposal on November 19. Despite a counter proposal raised by the Union at the December 3 session, the Union accepted the Company's previously implemented wage scale. To be more accurate, the effective date of the new collective bargaining agreement was November 15, 1979.



*Son, Inc. v. NLRB*, 427 F.2d 983, 985 (5th Cir.), cert. denied, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970). While an employer's refusal to reinstate such employees is deemed presumptively discriminatory, the employer may rebut the presumption by demonstrating that the employee engaged in misconduct during the strike falling outside the protection of the Act. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1335 (1st Cir.1977). Contrary to the ALJ, the Board determined that although Bishop, Hughes, and Barlow had engaged in misconduct during the strike, it was not sufficiently serious to warrant their discharge. In so doing, the Board did not reject the credibility determinations made by the ALJ. Regarding Bishop and Hughes, the Board found the remark about "taking care" of Walker ambiguous and unaccompanied by violence or physical gestures. Because this was an isolated incidence of verbal intimidation, the Board ordered Bishop and Hughes reinstated. The Board ordered similar reinstatement for Barlow based on its determination that his lewd and insulting characterizations directed at Industrial Relations Manager Barbara Lawler were insufficient to warrant discipline. We are mindful that "when there are differing views about the interpretation or significance of undisputed facts, each case must be decided on its particular circumstances, keeping in mind that labor disputes are ordinarily heated affairs . . . ." *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 514 (5th Cir.1968) (footnote omitted). Moreover, the Board is entitled to considerable deference in determining the scope of protected activity under section 7 of the Act, 29 U.S.C.A. § 157.<sup>9</sup> *NLRB v.*

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9. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C.A. § 157.



*Pipefitters Local 638*, 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed. 2d 1 (1977); *Associated Grocers*, 562 F.2d 1333, 1336. Reviewing the particular circumstances of this case, we enforce the Board's order reinstating the discharged employees.

### LANDIS BISHOP AND JEFFREY HUGHES

[11, 12] Georgia Kraft urges us to reject the Board's standard that verbal threats, short of a direct threat of immediate physical harm, lose the protection of the Act only when accompanied by physical acts or gestures. Instead, the Company advocates the objective standard followed by the First Circuit in *Associated Grocers* and the Third Circuit in *Local 542, Operating Engineers v. NLRB*, 328 F.2d 850 (3d Cir.), cert. denied, 379 U.S. 826, 85 S.Ct. 52, 13 L.Ed.2d 35 (1964). In determining when conduct is due the protection of the Act, those circuits consider "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act." *Local 542, Operating Engineers*, 328 F.2d at 852-53. See also, *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 520 (3d Cir. 1977). Although both standards have merit, it is our belief that the Board's standard comports with section 7 of the Act, in protecting strike-related conduct. Tested by the standard of the Board, Bishop and Hughes' verbal threats were not sufficient to justify their termination from employment.

In *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 845 (5th Cir. 1978), a striker was held dischargeable for issuing a threat similar to the one issued by Bishop and Hughes. When a non-striking employee informed a striker that he was working because he had to, the striker

retorted, "there's ways to keep you from it." 574 F.2d at 845. The court denied reinstatement because of this threat. The circumstances surrounding the strike in *Moore Business Forms*, however, were different from those at Georgia Kraft's Greenville plant. In *Moore Business Forms*, the strike was marked by pervasive violence directed not only at company and personal property, but toward persons as well. The evidence before the ALJ in this case indicates that although the Greenville strike was not immune from violence, the acts were directed only at company property. We find this evidence sufficient to provide a basis by which to distinguish *Moore Business Forms*.

#### PRESTON BARLOW

[13] We agree with the Board that Barlow's crude and obscene remarks directed at a female management executive as she crossed the picket line did not warrant his termination. Verbal obscenities which accompany threats of physical harm constitute serious misconduct and are not protected by the Act. See e.g., *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511, 512 (5th Cir.1971). Name-calling, however, without more, is privileged under the free speech provisions of section 8(c) of the Act, 29 U.S.C.A. § 158(c).<sup>10</sup> The order reinstating Barlow as an employee of Georgia Kraft is enforced.

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10. This section provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C.A. § 158(c).

## IV. CONCLUSION

As hereinabove set forth, the order of the Board is enforced.

ENFORCED.

CLARK, Circuit Judge, concurring in part and dissenting in part:

My dissent is limited to that part of the majority opinion enforcing the NLRB order that reinstates Landis Bishop and Jeffrey Hughes. The testimony cited at note 2 of the majority opinion and the record reflect that Bishop and Hughes went to Walker's house and addressed him at the doorway. I take the language "yeah, we'll take care of you" as a threat, given the context of the conversation. I refuse to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 81-7852

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GEORGIA KRAFT COMPANY,  
WOODKRAFT DIVISION,  
Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,  
Respondent, Cross-Petitioner.

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ON PETITION FOR REVIEW AND CROSS APPLICATION FOR  
ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

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**ON PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING  
EN BANC**

(Opinion January 24, 11 Cir., 1983, ..... F.2d .....)

(Filed April 8, 1983)

Before

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ (Illegible)

United States Circuit Judge

Greenville, GA

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Cases 10-CA-15289,  
10-CA-15293, and  
10-CA-15564

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GEORGIA KRAFT COMPANY,  
WOODKRAFT DIVISION  
and  
LABORERS' LOCAL UNION NO. 246

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**DECISION AND ORDER**

On December 18, 1980, Administrative Law Judge Howard I. Grossman issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed a reply brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions<sup>1</sup>

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1. In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's dismissal of certain allegations that Respondent violated Sec. 8(a)(1) of the Act.

of the Administrative Law Judge but only to the extent consistent herewith.

The Administrative Law Judge found, *inter alia*, that Respondent violated Section 8(a)(5) of the Act by bargaining to impasse with respect to certain nonmandatory subjects of bargaining; and that certain of the striking employees did not engage in strike misconduct, so that Respondent violated Section 8(a)(1) of the Act by suspending and discharging them.

Respondent excepts, *inter alia*, to the Administrative Law Judge's finding that it bargained to impasse in violation of Section 8(a)(5) of the Act. The General Counsel excepts to the Administrative Law Judge's finding that the parties herein did not reach agreement on a contract, and thus to his conclusion that Respondent did not violate Section 8(a)(5) of the Act by failing and refusing to execute the agreed-upon contract. The General Counsel also excepts, *inter alia*, to the Administrative Law Judge's finding that Landis Bishop, Jeffrey A. Hughes, and Preston Barlow engaged in strike misconduct sufficient to warrant their termination.

For the reasons set out below, we find merit to the above contentions of the General Counsel.

1. The record reflects that the Union was certified as the statutory representative of Respondent's production and maintenance employees on September 30, 1977, and that the parties thereafter entered into a collective-bargaining agreement effective January 1, 1978, through October 31, 1979. In July 1979, the Union notified Respondent of its wish to modify and renegotiate the terms of the agreement. The parties began negotiating on September 11, 1979, and it is undisputed that there were still some issues outstanding at the close of the fourth negotiating

session.<sup>2</sup> The principal negotiators during the first 4 sessions were Charles R. Barnes representing the Union, and Broughton Kelly representing Respondent. At the fifth bargaining session, on November 29, Howard Henson, a regional manager for the International Union substituted for Barnes in an effort to aid the bargaining process. In spite of Henson's presence, no significant progress was made that day.

Thereafter, on December 3, Henson and Kelly met again. At this session, Kelly presented a new seniority proposal, which specifically concerned lines of progression for unit employee promotions, as well as the procedure to be followed in the event of a reduction in force. Henson, not having the authority to make specific concession on behalf of the Union, stated that he would pass the seniority proposal along to the Union's negotiating committee. In addition, it was at this meeting that the subject of the possible discharge of certain striking employees was first broached by Kelly. There was no agreement on a contract by the close of the December 3 meeting, but on December 9, the Union sent a telegram to Respondent which read as follows:

THIS IS TO ADVISE YOU THAT THE LAST COMPANY OFFER PRESENTED ON DECEMBER 3, 1979, HAS BEEN ACCEPTED AS A FINAL AND BINDING CONTRACT ALL EMPLOYEES WHO COULD BE CONTACTED WILL RETURN BACK TO WORK ON THEIR REGULARLY ASSIGNED SHIFTS EF-

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2. Unless otherwise indicated, all dates hereinafter refer to 1979. The dates of the four sessions were September 11 and November 6, 14, and 27. By agreement of the parties, the contract was extended to November 15, and, when agreement had not been reached by that date, Respondent's employees engaged in an economic strike which continued until December 10, when the strikers reported to work.



FECTIONAL DECEMBER 10, 1979 WE ARE PREPARED  
TO MEET AT YOUR CONVENIENCE TO SIGN THE  
AGREEMENT

As promised by the telegram, the strike ended on December 10, and the striking employees reported to work.

In reviewing the evidence, the Administrative Law Judge characterized the December 3 meeting as follows:

Kelly's testimony shows that he wished to bargain with the Union about discipline of the strikers, and that the Company may have reconsidered the matter and may have contemplated discipline less than discharge. If not, the Company sought Union agreement to the discharges. Henson's stipulated testimony that he would not discuss the firing of strikers suggests that Kelly wished to bargain about the matter and Henson did not. It is obvious that the Company made a "proposal" at the December 3 negotiating session, involving Union agreement to discipline of strikers, and that the Union refused to discuss the matter. [ALJD, sec. III,A,2, par. 2.]

Based on the above-cited characterization of the record evidence,<sup>3</sup> and upon his finding that the Union did not, by its December 9 telegram, intend to accept Respondent's "proposal" on striker discipline, as well as upon his assumption that the "proposal" as to striker discipline was part and parcel of the ongoing contract negotiations, the Administrative Law Judge concluded that there was "no meeting of the minds," and thus no agreement which Re-

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3. Although the Administrative Law Judge also characterized Barnes' testimony on this issue as "unpersuasive," we note in passing that Barnes' testimony as to what transpired at the December 3 meeting is, in large part, irrelevant, since Barnes was not present when the alleged "proposal" was made.

spondent could legally be required to execute. Finally, and having decided that it was the issue of striker discipline that was the obstacle to agreement, the Administrative Law Judge determined that it was therefore "unnecessary to consider the myriad of other issues which the Company contends were unresolved." (ALJD, sec. III,A,2, par. 3.)

Contrary to the Administrative Law Judge, however, a review of the record plainly reflects that the issue of striker discipline was not, on December 3, presented by Respondent as a bargainable proposal, nor was it put forth on the date as a *quid pro quo* for agreement on a contract. Thus, it was unnecessary for the Administrative Law Judge to speculate as to what Henson's stipulated testimony "suggests," nor is it "obvious" that the issue of striker reinstatement was a bargainable "proposal" on December 3. Kelly was initially examined on this subject, as an adverse witness called by the General Counsel:

Q. Whose idea was it, Mr. Kelly, to give Mr. Henson . . . a list of strikers to be fired?

A. Mine.

Q. Do you want to explain for us any reason that you had for doing it at that time as opposed to any other?

A. No, no, just that we had the meeting scheduled with Mr. Henson that particular day, and we thought—I thought we should advise them about the situation with these employees.

Q. Is it your testimony that you wanted to bargain with Mr. Henson regarding the company's desire to fire strikers; was that the purpose of giving him . . . [the list]?

A. The purpose was to inform him of the conduct of these people and that we intended to terminate.

Q. And my question, I think, was a little broader. You're a person, I think, who was engaged in the negotiating session. Did you wish to bargain with Mr. Henson concerning that piece of paper?

A. The subject was opened to bargain if he had some specific request in regard to the people.

Q. Did you inform Mr. Henson that you wished to negotiate or bargain about it? "About it," I'm talking about [the list of strikers]?

A. No, not specifically. As I gave Mr. Henson that particular piece of paper, his reaction was that he—his statement was that he did not want to get involved with the termination of any strikers, and that the International Union was withdrawing from the negotiations. We really didn't discuss that at all. We took that position right off.

The following testimony was adduced on direct examination of Kelly:

A. I gave [Henson] the list at the end of the meeting after we had discussed each other's proposals. I gave him the list of the people we had observed in misconduct and it had the title at the top of it, People To Be Terminated for Misconduct. I told him we thought the conduct of these people was such that some disciplinary action was justified. When I gave him the list, he said something to the effect that he didn't want to be involved in the thing that we were planning on firing a lot of people and that the International Union was going to withdraw from the

negotiations and that it would be between the company and the Local Union from then on.

Q. Now this list of strikers that you presented to him, had the decision been made at that time to discharge those strikers?

A. No, not on December 3rd.

Q. What was your purpose for submitting that proposal to him?

A. Well, we really hadn't communicated at all to the Union about the misconduct as far as any disciplinary action was involved and it seemed to me that we ought to get on board or get on record with them that we had some—not charges, but we had observed these people doing things we thought were wrong and that something should be done about it. We had not talked to anyone about this until that particular time. So that is why I gave him the list.

Finally, and contrary to the Administrative Law Judge, a review of Henson's stipulated testimony likewise supports a finding that the list of strikers whom Respondent believed to have engaged in misconduct was not proffered by Respondent on December 3 as part of a "package deal" which the Union would have to accept in order to "get" a contract. The stipulation reads, in relevant part, as follows:

Kelly handed me 2 or 3 sheets of handwritten paper with the company's proposal on seniority and classification . . . .

I said I was not in a position to negotiate it but that I would take it back to the committee.

Kelly said that he did not want to deceive me and handed me another piece of paper . . . with names of

people that the company intended to fire. I told Kelly the meeting was over and I would not discuss anything about firing strikers. At no time during this meeting did Kelly say anything about any other areas that the parties may have discussed before. [G.C. Exh. 31.]

As is clear from the evidence presented by both parties, Respondent did not, at this juncture in the negotiations, present the issue of discipline of certain strikers as a proposal to be considered in conjunction with any of the then outstanding contractual issues. Thus, Kelly admitted under examination by counsel for the General Counsel that he did not inform Henson that he wished to negotiate or bargain about the list of strikers; and on direct examination Kelly revealed that his purpose was merely to "get on record" with the Union by letting its representative know that Respondent considered that form of discipline to be appropriate with respect to certain striking employees.<sup>4</sup> Accordingly, the discussion on December 3 with respect to the issue of striker discipline, did not, under the circumstances herein, signify a change in Respondent's "bot-

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4. The record does reflect that Kelly was asked by his counsel on direct examination:

Q. Did you intend to bargain with Mr. Henson about the list?

A. Yes, we could have. I told him the title we put at the top of the thing, "People To Be Terminated," but during a meeting when I talked to him, I didn't say the people were absolutely fired and were never going to come back. I said that some disciplinary action is justified.

It is plain, however that both the question and the answer are in the nature of conjecture, and thus not reflective of what actually transpired at the December 3 session. Likewise, the Administrative Law Judge's statement that "Kelly's testimony shows that he wished to bargain with the Union about the discipline of strikers," is not a realistic reflection of the events of December 3. In addition, the Administrative Law Judge's reliance on what Kelly may have "wished" is neither relevant to, nor probative of, what actually occurred.

tom line" as to what it considered necessary to reach agreement on a contract.

Having concluded that the issue of striker discipline was not injected into the negotiation process on December 2 as a contract proposal, we find it necessary, unlike the Administrative Law Judge, "to consider the myriad of other issues which the Company contends were unresolved." For the reasons fully set out below, we find that agreement on a contract was reached when the Union sent its December 9 telegram, and that Respondent thereby violated Section 8(a) (5) of the Act on and after December 11,<sup>5</sup> when it notified the Union that it was not prepared to execute a collective-bargaining agreement.<sup>6</sup>

As noted above, the parties met on four occasions prior to December 3; and the record reflects that, by the close of the November 27 session, Respondent had made known its position on all sections of the contract with

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5. Accordingly, and contrary to the Administrative Law Judge, we find it unnecessary to consider whether or not Respondent bargained to impasse on nonmandatory subjects of bargaining.

6. Respondent's December 11 letter states in pertinent part:

There are several matters that we must resolve before we will have an agreement on a complete contract, but I am encouraged from your telegram that we can reach a complete agreement in one more meeting. We also need to work out an understanding on how we will handle those employees who have been replaced but would still like to return to work when an opening becomes available. Lastly, I believe we should resolve the pending lawsuit and what is to be done with those employees who have engaged in misconduct during the strike. [G.C. Exh. 21.]

We note in passing that Respondent's letter confirms the fact that, as of December 11, Respondent had not "tied" agreement on a contract to the discipline of strikers. Thus, although the issue of striker discipline is mentioned, it is clearly within the context of pointing out the need for a strategy to smooth the way for a return to "business as usual" in the event the contract was settled to Respondent's satisfaction.

the exception of article 5, "Seniority." On November 6, Respondent had presented an initial modification of that article, and then on December 3, submitted a further modification which the Union accepted on December 9, along with all other of Respondent's proposals then "on the table." Nonetheless, Respondent claims that, at the time of the December 9 telegram, there were still issues not agreed upon, to wit: wages, contract duration, effective date, and the portion of article 23 dealing with Respondent's "Point System." It was these issues, in addition to the discipline of certain strikers and other strike-related issues, which Respondent memorialized in its proposed "Memorandum of Agreement" presented to the Union on December 19. Leaving aside, for the moment, the strike-related issues, the record is plain that all contractual issues set out in the December 19 memorandum had been previously submitted to the Union at various points during the bargaining process. Thus, on November 16, Respondent communicated to its employees the wage offer already presented to the Union; and, in addition, that wage offer clearly reflects that Respondent contemplated a contract of 3 years' duration.<sup>7</sup> Respondent's "Point System" offer was submitted to the Union at the November 6 negotiating session. Finally, the record is devoid of any indication that the wage, duration and "Point System" offers were either withdrawn prior to acceptance by the Union, or were, prior to December 9, somehow made contingent or conditional upon some other aspect of bargaining. With respect to the issue of the effective date of the contract, which Respondent claims had not been agreed to, the record reflects that the old contract expired on October 31, and that, throughout

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7. The record also reflects that Respondent implemented the economic terms of its "final offer" and so informed the Union by letter of November 16.

negotiations, neither side had articulated any proposal that would break the continuity between the expired contract and the new one. Indeed, that Respondent contemplated no such hiatus is obvious from its December 19 "Memorandum of Agreement," which calls for an effective date of November 1.

In spite of the record evidence, Respondent insists that these contractual issues reflected areas of disagreement. It seems to us, however, given the state of the record, that our analysis should initially proceed, not on the basis of whether or not the parties were in agreement with respect to these issues, but rather with the question of whether Respondent's offers in these areas were still viable as of December 9, when the Union sent its telegram. The Board has, in the recent past, had occasion to consider the question of under what circumstances an offer made during bargaining remains viable. In *Pepsi-Cola Bottling Company of Mason City, Iowa*, 251 NLRB 187, 189 (1980), the Administrative Law Judge stated, with Board approval, that:

[A] complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance. Respondent in the instant case took no such steps and when the Union abandoned all collateral demands, and elected to accept this complete package, a binding agreement was consummate [sic].

Similarly, in the case herein, all outstanding contractual issues were the subjects of specific proposals which, as noted above, had not, prior to December 9, been



withdrawn or otherwise made contingent on some other event. Thus, all proposals with respect to the areas of alleged disagreement remained viable, were available for acceptance, and were, in fact, agreed to by the Union's December 9 telegram. As discussed above, and contrary to the Administrative Law Judge, the record reflects, and we find, that resolution of the contractual issues was not, on December 3, made contingent upon resolution of the strike-related issues. Respondent, however, by its December 19, "Memorandum of Agreement," attempted to construct just such a contingency. Thus, even though the Union had capitulated on all outstanding issues as of December 9, Respondent nonetheless resurrected—unaltered—proposals which had been "on the table" and agreed to by the Union, made them contingent on the strike-related issues, and then claimed that there was no "meeting of the minds." Although refusal to execute an agreed-upon contract is more in the nature of a *per se* violation in that proof of bad faith is not necessarily required, we nonetheless observe that Respondent's above-described actions are demonstrative of the vacuity of its arguments that no agreement was reached.

In finding, as we do, that the parties reached agreement on a contract on December 9, and that Respondent unlawfully refused to execute that contract on December 11, and thereafter, we concede that bargaining herein was not a model of neatness and organization. Thus, the record shows that, although the Union's initial proposed changes were contained within a single document, Respondent chose to respond to the Union's proposal in a piecemeal fashion, presented in "dribs and drabs," sometimes typewritten, sometimes handwritten. This style of bargaining, we note, has made reconstruction of events somewhat difficult, but not impossible; and we wish to emphasize

that our review of the documents herein leaves no doubt that, with respect to all areas which Respondent claims were still in dispute, Respondent had already submitted proposals which it had not withdrawn or on which it had otherwise placed conditions. We therefore conclude that as of December 9, when the Union telegraphed its acceptance of the remaining outstanding proposals, that there was a "meeting of the minds" and agreement on a contract.

As of December 9, and pursuant to Section 8(d) of the National Labor Relations Act, as amended, Respondent was clearly obligated to assist the Union in reducing the agreement to writing and to thereupon execute such agreement. See, generally, *Kennebec Beverage Co., Inc.*, 248 NLRB 1298 (1980), and cases cited therein. The record reflects, however, that, when the Union requested such assistance on December 11,<sup>8</sup> Respondent countered with its December 11 letter, already set out in footnote 6, *supra*, which took issue with the Union's position that agreement had been reached, and then sought to buttress that position by means of its December 19 "Memorandum of Agreement," which introduced new contingencies. Subsequent to the December 19 meeting, a good bit of correspondence passed between the parties: the Union claiming that agreement had been reached, and Respondent claiming quite the opposite. Then, on March 3, 1980, Respondent again "took issue" with the Union's position that agreement had been reached, and wrongly placed upon the Union the burden of reducing any such agreement to writing. Thereafter, on March 12, 1980, the

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8. The Union's letter states:

A telegram sent to your office dated December 9, 1979 informed you that the last Company offer presented to the Union had been accepted as a final and binding contract. We ask that you contact the undersigned as soon as possible to set a meeting to finalize the language and sign the Agreement.

Union nonetheless notified Respondent that it had reduced the agreement to writing; but Respondent's March 14 reply referred to an "alleged" agreement, and clearly stated that it would only agree to "review" any such writing. The correspondence continued in the same vein until July 1980, when, on July 11, and just prior to the hearing in this matter, the Union sent Respondent a "writing" of the December 9 agreement.

A review of this document reflects some minor deviation from the proposals submitted by Respondent, and agreed to by the Union on December 9.<sup>9</sup> We nonetheless conclude that any such deviation is not indicative

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9. The "writing" referred to is G.C. Exh. 34, and the "deviations" are as follows:

The first paragraph of art. 5, sec. 2,A, p. 4, is apparently inconsistent with the Union's acceptance of Respondent's December 3 proposal, to include the third paragraph in that subsection. In any event, the record is clear that the Union unequivocally accepted Respondent's December 3 "Seniority" proposal. We note that the "offending" first paragraph was part of an initial proposal submitted by Respondent on November 6.

Art. 5, sec. 2,B, subpar. 2, p. 5, omits the following sentence: Employees' shift will be changed only after attempts have been exhausted to fill the position from employees on the shift where the vacancy exists.

This sentence appears in Resp. Exh. 19, submitted by Respondent on November 6.

Art. 23 reflects the correct percentage wage increase, but neglects to translate that percentage into a "dollars/hour" rate.

Art. 23, sec. 3, represents a written proposal submitted by Respondent (Resp. Exh. 23(a)—(c)) but which Respondent did not wish to incorporate into a written contract. The issue of whether or not to reduce an agreed-upon provision to writing, however, is not the sort of failure to agree which would preclude our finding a "meeting of the minds." Thus, if a party insists, an agreed-upon provision must be reduced to writing. See, generally, *Amalgamated Clothing Workers of America, AFL-CIO [Henry I. Siegel Co., Inc.] v. N.L.R.B.*, 324 F.2d 228 (2d Cir. 1963).

Thus, it appears that of the four "inconsistencies" noted above, only the omission of the sentence from p. 5 of G.C. Exh. 34 has no apparent explanation.

of a lack of agreement between the parties, but is rather the result of Respondent's own refusal to acknowledge the existence of an agreement, as well as its refusal to assist the Union in reducing the agreement to writing, and it is this conduct, to wit; Respondent's obstruction and frustration of the bargaining process after agreement was reached, that we find to be unlawful.<sup>10</sup>

Accordingly, and based on all of the above, we find that an agreement on a contract was reached on December 9, and that Respondent violated Section 8(a) (5) of the Act on December 11, and thereafter, when it failed and refused to execute the agreed upon contract.

2. As noted above, General Counsel excepts, *inter alia*, to Administrative Law Judge's conclusions that employees

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10. Indeed, we have already set out the facts herein which plainly show that agreement was achieved. We find *Trojan Steel Corporation*, 222 NLRB 478 (1976), *enfd.* 551 F.2d 308 (4th Cir. 1977), to be particularly relevant to the facts herein.

In *Trojan Steel*, the company, like Respondent herein, submitted its proposals "piecemeal"; and also, upon the union's request, refused to assist in reducing any agreement to writing. When that union finally collated the separate proposals, pieced together a final document, and then submitted it to the company, the company thereupon refused to execute the document, claiming massive variations from what had been agreed to. The Administrative Law Judge, comparing the "writing" with the numerous and separate proposals, found only three deviations, and also found that, with respect to these particular issues, the record was clear that there had in fact been agreement with the company's position in all disputed areas. The company argued that the agreements made had no bearing on the case, and that the Board could only consider the writing submitted by the union to determine whether there had, in fact, been a meeting of the minds. The Administrative Law Judge, with Board approval, concluding that adopting the company's position would exalt form over substance, found that the parties did, in fact, reach agreement. The facts of the case herein differ from those of *Trojan Steel* insofar as Respondent does not now claim that the writing submitted by the Union on July 11, 1980, is evidence of a lack of agreement. Nonetheless, the document is before us, and, as noted above, any inconsistencies in that document *vis-a-vis* the agreement reached on December 9, can be attributed to Respondent's unlawful frustration of the bargaining process.

Landis Bishop, Jeffrey A. Hughes, and Preston Barlow were lawfully discharged for having engaged in strike misconduct.

With respect to Bishop and Hughes, the Administrative Law Judge credited the testimony of William Walker, an employee who chose not to strike and who was also visited, at home, by Bishop and Hughes. The Administrative Law Judge found that Bishop and Hughes stood outside an open glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker testified that Bishop and Hughes were drunk, cursed, and said that he, Walker, was "screwing them out of their . . . damn money" by working during the strike. Walker also testified that Bishop said that he would "take care" of Walker if he returned to work—a statement repeated by Hughes. Finally, the Administrative Law Judge found that Walker asked them to leave early in the conversation, but that they "took their time doing so."

Contrary to the Administrative Law Judge, and in accordance with our Decision in *MP Industries, Inc.*, 227 NLRB 1709, 1710-11 (1977), we conclude that the actions of Bishop and Hughes constitute an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge. Their remark about "taking care" of Walker was ambiguous, and it was unaccompanied by violence or physical gestures.<sup>11</sup>

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11. The facts in *MP* are remarkably similar to the case herein. Thus, in *MP*, pickets Barrows and Walther followed strike replacement Debbie Whitworth to her house, in Walther's car. A conversation took place when the strikers reached Whitworth's home, during which Barrows and Walther told Whitworth, "You had better watch it Debbie. We know where you live." By contrast, two of the cases cited by the Administrative Law Judge in support of his finding of misconduct are inapposite to the facts herein. Thus, *Otsego Ski-Club-Hidden Valley, Inc.*,

With respect to Barlow, the Administrative Law Judge credited the testimony of Industrial Relations Manager Barbara Lawler that, as she was crossing the picket line, she heard Barlow refer to her as "that f--- bitch," and that "mother f---, that ugly bitch." The Administrative Law Judge also found that Barlow called Lawler a "bitch" on another occasion. Based on these facts, the Administra-

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Footnote continued—

217 NLRB 408 (1975), concerned, *inter alia*, an employee, who, while on the picket line with other strikers, approached an automobile, struck a picket sign through the open window on the passenger side of the car, and threatened the driver with physical harm. The Board, Member Fanning dissenting, found the employee's misconduct sufficiently egregious to warrant his discharge. By contrast, and as noted above, the statements made by the strikers Bishop and Hughes were ambiguous, and did not evidence a purpose to inflict physical harm or engage in any other foul play. Finally, neither Bishop nor Hughes accompanied their words with any gestures—threatening or otherwise.

In light of his dissent in *Otsego*, Member Fanning finds it unnecessary to distinguish that case.

In *Daniel A. Donovan, et al., d/b/a New Fairview Hall Convalescent Home*, 206 NLRB 688, 750-751 (1973), all the employees engaging in the "home visits," with the exception of one employee, also engaged in acts of physical violence and other serious misconduct at various times during the course of the strike; and it was the totality of this conduct which the Administrative Law Judge and Board considered in finding that discharge was warranted. By contrast, and as set out above, neither Bishop nor Hughes engaged in acts, or even threats, of violence. With regard to the one employee in *New Fairview Hall* whose only misconduct was engaging in a "home visit," the Board reversed that Administrative Law Judge, and found respondent's refusal to reinstate the employee to be unlawful.

Finally, the Administrative Law Judge cited *N.L.R.B. v. Syncro Corporation*, 597 F.2d 922 (5th Cir. 1979), denying enforcement 234 NLRB 550 (1978), which, like the other two cases cited by him, is factually inapposite. Thus, in *Syncro*, the alleged employee threat to slash the tires of another employee was not made in the context of a strike; and, in addition, the issue was whether the asserted reason for the employee's discharge was a pretext or the real reason. Here, there is no question as to the reason for the discharges and the only issue is whether the misconduct was sufficiently serious to remove the employees from the protections of the Act. See the discussion of the Barlow, discharge, *infra*.

tive Law Judge concluded that Barlow's conduct was sufficiently "insulting and abusive" to warrant his discharge, and cited several cases in support of his conclusion.<sup>12</sup> Upon a consideration of the facts herein, as well as the applicable law, we conclude that Barlow's actions on the picket line in directing lewd and insulting characterizations at Lawler, were not sufficiently egregious to warrant discipline. In so concluding, we note that each and every case cited by the Administrative Law Judge in support of his conclusion occurred within the context of the workplace, and not, as here, on the picket line. In relying on these cases, the Administrative Law Judge overlooked the well-established principle that "not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act. Thus, absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language . . . ." *Coronet Casuals, Inc.*, 207 NLRB 304 (1973).

In this regard, our holding in *Robbins Company*, 233 NLRB 549 (1977), has application to the facts we now consider. In *Robbins*, an employee made crude obscene remarks and suggestions regarding sex, and directed these remarks to a female cost accountant supervisor, although we do not necessarily view gender as being relevant, as she crossed the picket line. The Administrative Law Judge in *Robbins*, with Board approval, stated that:

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12. The cases cited by the Administrative Law Judge are: *Rockland Chrysler Plymouth, Inc.*, 209 NLRB 1045 (1974); *Atlantic Steel Company*, 245 NLRB 814 (1979); *Veeder-Root Company, Altoona Division*, 192 NLRB 973 (1971); and *Mueller Brass Company, a subsidiary of U. V. Industries, Inc. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977), denying enforcement 220 NLRB 1127 (1975).



The language used to express disapproval of persons crossing picket lines seldom comports with the standards of ordinary discourse. While profane epithets which accompany and form an integral part of terrorist tactics are not protected, the Board has long viewed name-calling, without more, privileged under the free-speech provisions of 8(c).<sup>13</sup>

Based on the above, we hold that Barlow's actions on the picket line did not warrant discharge by Respondent herein.

Finally, and under the circumstances herein, it is unnecessary for us to find that the discharge of certain of Respondent's employees for allegedly having engaged in strike misconduct violated Section 8(a)(3), since the Administrative Law Judge has already found, and we concur, that such discharges violated Section 8(a)(1) of the Act. See, generally, *General Telephone Company of Michigan*, 251 NLRB 737 (1980).

#### Amended Remedy

We adopt and incorporate herein the provisions of "The Remedy" section of the Administrative Law Judge's Decision with the following modifications. First, we hereby modify paragraphs 2 and 3 to include employees Landis Bishop, Jeffrey A. Hughes, and Preston Barlow.<sup>14</sup>

We also modify paragraph 4 to the extent that the employment records of Clarence Watson and Wiley Shepherd shall be credited with working time from such date as it may be determined that, absent the discrimina-

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13. 233 NLRB 549, 557 (1977).

14. In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.



tion against them, they would have been reinstated to their prior jobs or substantially equivalent ones, prior to the time they returned to employment with Respondent.

Finally, we modify paragraph 6 of the Administrative Law Judge's recommended remedy to reflect that we have found Respondent to be in violation of Section 8(a)(5) of the Act by refusing to execute a collective-bargaining agreement previously agreed upon, and shall order Respondent, upon request by the Union, to forthwith execute the contract upon which agreement was reached on December 9, 1979.<sup>15</sup>

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Georgia Kraft Company, Woodcraft Division, Greenville, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling its employees that the grievance procedure as provided for by the expired contract no longer exists.

(b) Suspending, discharging, or otherwise disciplining striking employees for alleged misconduct in which they have not engaged.

(c) Discharging unreinstated strikers for their refusal to accept jobs which are not substantially equivalent to their former jobs.

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15. Since Respondent has engaged in unfair labor practices of a sufficiently egregious nature as to demonstrate a disregard for employees' fundamental statutory rights, we shall include in our Order a provision requiring Respondent to cease and desist from in any other manner infringing upon the rights guaranteed to its employees by Section 7 of the Act. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

(d) Failing and refusing to pay accrued vacation pay to striking employees who are entitled to same.

(e) Refusing to bargain in good faith with Laborers' Local Union No. 246 by refusing to execute an agreed-upon contract.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay each of the following listed employees backpay from December 10, 1979, until such time as he or she returned to employment with Respondent, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy," as amended in this Decision and Order, and credit the employment record of each such employee, for such period, with working time for seniority and vacation purposes:

Kenneth V. Palmer

James Kelly

Mary Burth

Eulice Favors

Yvonne Blalock

Robin O. Boudrie

Donald Ray Thrash

Phillip J. Faulkner

Jerry Kirbo

Robert Barry McCoy

Cecil Barber

James O'Neal

Michael W. Buttram

Stephen C. Smith

Charles Brown

John Ward

Anthony Crouch

Carlene Frost

Joseph M. Williams

Robert L. Russell

Landis Bishop

Jeffrey A. Hughes

Preston Barlow

(b) Prepare and submit to the Regional Director for Region 10 a reconstructed daily record of available jobs and names of incumbents holding such positions including the date of their hire and vacancies, if any, for the period from December 20, 1979, until such time as Clarence Watson and Wiley Shepherd returned to employment with Respondent. In the event that such reconstructed record shows that the same job held by Watson or Shepherd, or a substantially equivalent one, became available prior to the time each employee was rehired, make him whole for any loss of pay and other benefits he may have suffered, with interest, by reason of Respondent's unlawful discharge of him, and credit the employment record of each such employee with working time for seniority and vacation purposes, in accordance with the Administrative Law Judge's Decision entitled "The Remedy," as amended in this Decision and Order.

(c) Make whole Carlene Frost and Mary Burth by paying each of them 2 weeks' vacation pay for 1979, to the extent that they have not already received same, with interest as set forth in the Administrative Law Judge's Decision entitled "The Remedy."

(d) Upon request by Laborers' Local Union No. 246, execute forthwith the contract upon which agreement was reached with the Union on December 9, 1979, completed copies of which shall be furnished by the Union.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order, and the amount of backpay due.

(f) Post at its plant at Greenville, Georgia, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the consolidated complaints not specifically found herein be, and they hereby are, dismissed.

Dated, Washington, D.C. September 30, 1981

.....  
John H. Fanning, Member

.....  
Howard Jenkins, Jr. Member

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Don A. Zimmerman, Member  
National Labor Relations Board

(Seal)

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16. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
BRANCH OFFICE  
ATLANTA, GEORGIA

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Cases 10-CA-15289  
10-CA-15293  
10-CA-15564

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GEORGIA KRAFT COMPANY  
WOODCRAFT DIVISION<sup>1</sup>

and

LABORERS' LOCAL UNION NO. 246

*Robert G. Levy, II, Esq.,*  
for the General Counsel.

*J. Roy Weathersby, Esq., and*

*John N. Raudabaugh, Esq., (Powell,*  
*Goldstein, Frazer & Murphy) for*  
*the Company.*

*Mr. Charles R. Barnes, for the*  
*Union.*

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**DECISION**

Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge:  
This case was tried in Newnan, Georgia, on July 14 through

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1. The formal papers in Cases 10-CA-15289 and 10-CA-15293 state the Company's names as "Woodcraft Division/Georgia Kraft Company", while the charge in Case 10-CA-15564 gives the name indicated above. Although the second complaint uses both names, the contract between the Company and the Union shows the above-captioned name to be correct (G.C. Exh. 2).

18, 1980. The charge in Case 10-CA-15289 was filed on December 12, 1979, and the charge in Case 10-CA-15293 on December 14, 1979, by Laborers' Local Union No. 246 (herein the Union). An amended charge in Case 10-CA-15293 was filed by the Union on January 7, 1980, and a second amended charge on January 29, 1980. An order consolidating cases and complaint (herein the first complaint) were issued on February 4, 1980. The charge in Case 10-CA-15564 was filed by the Union on March 4, 1980, and a complaint (herein the second complaint) and an order consolidating cases were issued on April 18, 1980.

The complaints allege that Georgia Kraft Company/Woodcraft Division<sup>2</sup> (herein the Company) violated Section 8(a)(1) of the National Labor Relations Act (herein the Act) by (1) interrogating its employees concerning their Union sympathies and activities; (2) telling them that (a) they could not file grievances, (b) they could no longer have a Union steward present at disciplinary interviews because the Union no longer existed, (c) there was nothing they could do about written warnings because there was no union and no contract, (d) the Company would not sign a contract with the Union, and (e) the Company would bypass the Union in processing employee grievances; (3) denying an employee's request for Union representation during interviews which the employee had reasonable cause to believe would result in disciplinary action; (4) conducting such interviews notwithstanding its refusal to permit such representation; and (5) discharging and thereafter failing to reinstate an employee as a result of such interviews.

The complaints also allege that the Company violated Section 8(a)(3) and (1) of the Act by discharging and thereafter failing to reinstate 28 named employees, and by

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2. *Ibid.*

refusing to pay accrued vacation pay to two of them, because said employees engaged in concerted activities for mutual aid and protection.

Finally, the complaint in Cases 10-CA-15289 and 10-CA-15293 alleges that the Company violated Section 8(a) (5) and (1) of the Act by refusing to execute a collective-bargaining agreement to which the parties had agreed.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs from the General Counsel and the Company, I make the following:

### Findings of Fact

#### I. Jurisdiction

The Company is a Delaware corporation with an office and place of business at Greenville, Georgia, where it is engaged in the operation of a lumber mill. During calendar year 1979, which period is representative of all times material herein, the Company sold and shipped from its Greenville, Georgia, facility finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. The Labor Organization Involved

The Company admits, and I find, that the Union is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

### III. The Alleged Unfair Labor Practices

#### A. *The Alleged Violation of Section 8(a)(5)*

##### 1. *The Bargaining History and Intervening Strike*

The Union was certified as the representative of the Company's production and maintenance employees on September 30, 1977, and the parties thereafter entered into a collective-bargaining agreement effective from January 1, 1978, until October 31, 1979. In July 1979, the Union timely notified the Company that it wished to modify and renegotiate the terms of the agreement.

The first negotiating session was held on September 11, 1979, the principal representatives being Charles R. Barnes for the Union and Broughton Kelly for the Company. The parties made proposals on a variety of subjects, but had not reached agreement by October 31, the end of the contract term. By agreement of the parties, the contract was extended to November 15, 1979, but the parties had still not reached agreement, and on that date the Union called a strike. According to Union Representative Barnes, the parties had reached "final positions" on a number of issues in meetings on November 6, 14, and 27, 1979.

The next meeting was held on November 29, 1979. The Union's representative was Howard Henson, Regional Manager for the Laborers' International Union. Although Henson was not called as a witness, the parties stipulated that he would have testified that he explained to Company representative Kelly that he was there to see whether "some movement could be made."

Henson and Kelly met again on December 3, 1979, and discussed seniority and the Company's desire to reorganize departments. Henson said that he would take the Company's proposal back to the Union committee.



Kelly also informed Henson, according to the latter's stipulated testimony, that he did not wish to deceive him, and handed him a list of strikers whom the Company intended to discharge. Henson replied that he would not discuss anything about firing strikers.

Kelly testified that he told Henson the employees had engaged in misconduct, warranting some kind of disciplinary action. According to Kelly, the Company had made no decision as of December 3, and would have considered some kind of discipline less than discharge.

On December 9, the Union sent a telegram to the Company reading as follows:

"THIS IS TO ADVISE YOU THAT THE LAST COMPANY OFFER PRESENTED ON DECEMBER 3, 1979, HAS BEEN ACCEPTED AS A FINAL AND BINDING CONTRACT ALL EMPLOYEES WHO COULD BE CONTACTED WILL RETURN BACK TO WORK ON THEIR REGULARLY ASSIGNED SHIFTS EFFECTIVE DECEMBER 10, 1979 WE ARE PREPARED TO MEET AT YOUR CONVENIENCE TO SIGN THE AGREEMENT."

The strike ended the following day, December 10, and the strikers came back to the plant, but the Company did not allow all of them to return to work, as described hereinafter.

Kelly responded to the Union telegram by letter dated December 11, stating that several matters had to be resolved before there was agreement on a contract, and that this might be accomplished in one more meeting. The letter mentions the handling of strikers who had been replaced but who desired their jobs back, employees who allegedly had engaged in misconduct, and a pending "lawsuit" against the Company. Barnes also sent Kelly a letter

on the same date, asking for a meeting "to finalize the language and sign the Agreement."

The parties met again on December 19, with the intervention of a Federal mediator. Barnes returned as the principal Union representative instead of Henson, and Kelly continued for the Company. Kelly gave Barnes a proposed "Memorandum of Agreement" with 20 proposals, 2 of which are that the discharges of employees "who have been terminated" are to be "final and binding" upon the Union, and that the Union agree to withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts against the Company or its employees."

Barnes stated that he had not engaged in any prior discussion with Kelly about discharging employees, although he acknowledged seeing a list of employees to be discharged which had been given to Henson (by Kelly on December 3). Barnes testified that he told Kelly that the employees were not guilty of the offenses with which they were charged.

Barnes was asked on cross-examination whether the Union's December 9 telegram, accepting the Company's December 3 offer, meant that the Union was accepting the Company's proposal to discharge employees. The Union representative replied that Kelly's statement to Henson on December 3 about discharging employees was not a "proposal", but, rather, was something the Company had already decided to do, and was not subject to bargaining. According to Barnes, the only "proposal" was the Company's position on departmental reorganization and progression of jobs, and it was this offer, plus all of the Company's previously stated positions, which the Union intended to accept by its December 9 telegram. Barnes stated that

these positions had become fixed as of November 6, and had remained the same through the November 14 and 27 meetings.

The December 19 meeting concluded, according to Barnes, with Kelly saying that the Union would have to sign the Memorandum of Agreement to which Barnes replied that he would not sign an agreement to discharge 20 employees. Kelly then received a telephone call, said that a decertification petition had been filed, and that the Company was not going to sign an agreement.

Kelly testified that the Memorandum of Agreement contained some subjects which were new, and others which had been covered previously. These were items "of concern" to Kelly, and he wanted "to get them straightened out." He obtained Barnes' agreement on some of the items but failed to reach an accord on others, including the provision for firing strikers.

The Company representative stated that he received a message during the meeting to the effect that a decertification petition had been filed, and that he informed the Union representatives of this fact. Kelly denied telling the Union that he would not sign an agreement under these circumstances. Instead, he informed the Union that he did not think the negotiations should continue with the decertification petition "hanging over our heads." (The petition was later dismissed.)

I credit Kelly's account of his reaction to the news of the decertification petition. However, I also credit Barnes' uncontradicted testimony that Kelly demanded that the Union agree to the terms in the Memorandum of Agreement, that Barnes refused to agree to the firing of strikers, and that the discussion of the decertification petition took place thereafter.

On February 22, 1980, Kelly wrote to Barnes that the Company had implemented its December 3 proposal on Company reorganization of departments, but was experiencing morale problems because of employee opposition to changes in shifts. Accordingly, Kelly suggested a change in the Company proposal. Barnes answered by telegram dated February 29, 1980, that the parties had a valid contract, and that the Union objected to any unilateral change. Kelly responded by letter dated March 3, 1980, to the effect that there was no contract. He noted that the Union had not submitted any document which the Company could sign—and suggested as the reason the fact that there were unresolved issues between the parties.

By letter of March 12, 1980, Barnes repeated the Union's opposition to any "modification of the language of our Agreement," and stated that the Agreement was "completely typed" and ready for signature. Kelly answered two days later, on March 14, 1980, with a request for a copy of the "alleged" agreement, and a restatement of the Company's position. On March 31, 1980, he wrote that he had not yet received a copy, and asked that it be sent as soon as possible. Kelly's letter avers that the Union's "continued refusal to forward a copy of the contract is . . . bad faith bargaining."

Barnes replied to Kelly by letter dated April 9, 1980, and apologized for the delay in his response, which he attributed to an automobile accident and hospitalization. Barnes repeated that the contract was "totally prepared and typewritten" and ready for signature, and expressed opposition to the Company's charge of Union bad faith. Further, Barnes contended, because Kelly had referred to an "alleged" agreement, and because of the Company's basic position, there was "little need in wasting the postage sending (the Company) a copy of the Agreement."

In a telegram to the Union's business manager, Tommy L. Williams, on June 6, 1980, Company counsel Weathersby requested a meeting to "confer, negotiate, and discuss" the documents mentioned in Barnes' March 12, 1980 letter to Kelly. The telegram requests a copy of the agreement, suggests a meeting with a Federal mediator, mentions three dates the Company would be available, and advises that the Company representative would have authority to execute a contract if in agreement with its terms. Weathersby repeated this request in letters to Williams and Barnes on June 10, 1980.

On June 11, 1980, Barnes replied to Weathersby by telegram attributing delay to the Company, but specifying possible meeting dates in July 1980. Weathersby replied by letter on June 19, 1980, with an agreement to meet on July 3, 1980, one of Barnes' suggested dates. The letter cautions that the Company was not making a commitment to execute a contract it had never reviewed.

Barnes testified at the hearing that he became ill on July 2, 1980, and instructed his secretary to cancel the July 3 meeting. On the same day, July 2, Weathersby sent duplicate telegrams to Barnes and Williams protesting the cancellation. Henson sent a telegram to Weathersby the following day saying that cancellation was necessary because Barnes was the only Union representative who could represent the Company's employees, and Barnes sent a telegram on July 7 attributing the cancellation to illness. Barnes noted that he would be busy the next few weeks on matters including the hearing in the instant case, but promised to get in touch with the Company as to an alternate date. Barnes testified (on July 14, 1980) that he sent the Company a copy of the proposed contract on July 11, 1980, after advising them of his action by telegram the prior day.

## 2. Analysis and Conclusions

The General Counsel argues that, although there were differences between the parties through the December 3 meeting, the Union's December 9 telegram accepted the Company's offers on all unresolved issues and constituted acceptance of those offers, thus creating a contract. He also argues that the Company's demand that the Union withdraw charges against the Company, and agree to the discharge of certain strikers for alleged misconduct, constituted insistence upon nonmandatory subjects for bargaining and therefore was violative of Section 8(a)(5). The Company argues that there was no agreement because of numerous unresolved issues despite the Union's telegram, and that therefore there was no contract to execute.

It is clear that there never was any agreement between the parties. All parties concede that there was no agreement prior to the December 3, 1979 meeting between Union Representative Henson and Company Representative Broughton Kelly. At that meeting, Kelly requested Union agreement to Company discipline, possibly discharge, of strikers who had allegedly engaged in misconduct. Barnes' testimony, to the effect that this was not a Company "proposal," is not persuasive. Although the strikers' discharge notices stated that they had been terminated November 15, this had not been implemented. Kelly's testimony shows that he wished to bargain with the Union about discipline of the strikers, and that the Company may have reconsidered the matter and may have contemplated discipline less than discharge. If not, the Company sought Union agreement to the discharges. Henson's stipulated testimony that he would not discuss the firing of strikers suggests that Kelly wished to bargain about the matter and Henson did not. It is obvious that the Company made a "proposal" at the December 3 negotiating session, involving

Union agreement to discipline of strikers, and that the Union refused to discuss the matter.

Nor did the Union intend to accept this proposal in its December 9 telegram. Barnes testified explicitly that that communication was intended only to accept the Company's December 3 offer on departmental organization and progression of jobs, plus the Company's position on all other unresolved issues. Since the telegram was not intended to accept the Company's proposal to discipline strikers, there was no meeting of the minds. This fact makes it unnecessary to consider the myriad of other issues which the Company contends were unresolved.

Inasmuch as there never was any agreement, the Company did not violate Section 8(a) (5) by refusing to execute one. [I note in passing that the Union did not deliver a copy of the alleged contract to the Company for signing until months after the supposed agreement.]

It is also clear that the Company, by demanding on December 19 that the Union withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts," was thereby insisting on the Union's agreement to a nonmandatory subject of bargaining.<sup>3</sup> At the time of this demand, the Union had already filed a charge and an amended charge, on December 12 and 14, 1979, and thereafter filed additional charges as described above.

There is no evidence that the Company ever receded from this position, set forth on December 19, 1979, and

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3. *N.L.R.B. v. Local 964, United Brotherhood of Carpenters and Joiners of America*, 447 F.2d 643, 78 LRRM 2167, 2168 (2d Cir., 1971), *enfg.* 181 NLRB 948 (1970); *International Union of Operating Engineers, Local Union No. 12, et al.*, 246 NLRB No. 81 (1979); *Peerless Food Products, Inc.*, 231 NLRB 530 (1977); *Kit Manufacturing Co., Inc.*, 142 NLRB 957, 971 (1963), *enfd. as mod.* 335 F.2d 166, 56 LRRM 2988 (9th Cir., 1964).



the record shows that this was the last negotiating session. Although there were numerous communications thereafter, neither party changed position—the Union, that it had reached agreement with the Company; and the Company, that any agreement must contain the terms of the Memorandum of Understanding of December 19. I therefore find that the parties reached impasse on the terms of that Memorandum, including the Company's insistence on the Union's withdrawal of any "proceeding or filing." By such insistence the Company violated Section 8(a)(5) and (1) of the Act.<sup>4</sup>

The General Counsel's contention that the Company similarly violated the Act by insisting that the Union agree to the Company's discharge of certain strikers, presents a more difficult issue. The first question, of course, is whether the discharges were "terms and conditions of employment" within the meaning of Section 8(d) of the Act. It would seem that the most elementary "condition" of employment is the question of whether employment exists in the first place, and that it therefore is a mandatory subject of bargaining. And thus it appeared in an early case where the Supreme Court held that an employer's contract with a company-dominated union forestalled collective bargaining on the discharged employees' rights to present grievances over their discharges to the employer, through their chosen labor organization.<sup>5</sup>

Many cases later, however, distinctions began to appear, and Mr. Justice Stewart stated in a concurring opinion in the *Fibreboard* decision:<sup>6</sup> "On one view of the

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4. *Ibid.*

5. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 6 LRRM 674, 680 (1940).

6. *Fibreboard Paper Products Co. v. N.L.R.B.*, 379 U.S. 203, 57 LRRM 2609 (1964).



matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all."<sup>7</sup> His concurring opinion, however, cites various employer practices which have been held to be mandatorily bargainable, and he ultimately agrees with the Court's opinion placing subcontracting in that classification.

As noted previously, the employees' discharge notices were dated November 15, but had not been implemented prior to the December 3 and December 19 negotiating sessions, in which the demand for Union agreement to the discharges or other discipline first arose. However, the Company did not allow the strikers to work on December 10, which, I find hereinafter, constituted disciplinary suspensions on that date, followed by discharge on December 20.

The Board has concluded that an employer's demand for nonreinstatement of illegally discharged employees is a nonmandatory subject of bargaining.<sup>8</sup> The question presented by the instant case is whether the legality or illegality of the discharges determines the legality or illegality of the Company's demand, under Section 8(a)(5), for Union waiver of the employees' employment rights.

In a recent case<sup>9</sup> the Board appears to have answered this question in the affirmative. In that case the union demanded reinstatement of an employee who had been discharged for reasons which were unknown, as a condition of the union's reaching agreement with the employer.

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7. *Ibid.* 57 LRRM at 2616-2617.

8. *Nordstrom, Inc.*, 229 NLRB 601, fn. 3, 609-610 (1977).

9. *Olin Corporation*, 248 NLRB 1137 (1980).

Noting that there was no contention that the discharge constituted an unfair labor practice by the employer, the Board stated: "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory within the meaning of the Act. Thus we conclude that the Union's injection of (the employee's) termination into the ongoing bargaining was, in the circumstances, an attempt to frustrate the bargaining process, and we find it to be in violation of Section 8(b) (3)."<sup>10</sup>

This seems to mean that if the discharge *had been* discriminatorily motivated, the union would have been justified in conditioning agreement with the employer on reinstatement of the employee. A necessary corollary of this position is that an employer similarly does not violate Section 8(a) (5) if he conditions agreement with a union on nonreinstatement of a discharged employee, so long as the discharge was not unlawful. Principles of equity in assessing the relative bargaining obligations of employer and labor organization require this conclusion. As the Board stated, "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory. . . ."<sup>11</sup> The result in *Nordstrom*<sup>12</sup> is not inconsistent with this rationale, because in that case the employees covered by the employer's nonreinstatement demand were unlawfully discharged, and, accordingly, the nonreinstatement demand was also found to be unlawful.

I conclude that disposition of this argument by the General Counsel awaits determination of the Section 8(a) (3) issues.

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10. *Ibid.*, 248 NLRB at 1141.

11. *Ibid.*

12. *Supra*, fn. 8.

C. *Alleged Violations of Section 8(a)(3)*

1. *Introduction*

As described above, the strike began on November 15, 1979. The comparative numbers of strikers, nonstrikers, and alleged discriminatees are not clear from the record. In a Complaint filed in a Georgia state court, described hereinafter, the Company stated that there were 200 employees in the plant. Plant Manager McCollum testified that he saw 140 pickets on the first day of the strike, while Industrial Relations Manager Barbara Lawler mentioned 60 as the most that she saw. Inasmuch as there are 28 employees alleged to have been discriminatorily discharged (in the first complaint), it is reasonable to infer, and I find, that there were at least twice as many strikers as alleged discriminatees.

After the Union's telegram of December 9, 1979, advising the Company that the Union was accepting the "last Company offer" (of December 3), and that employees would return to work on December 10, numbers of strikers reported for work. Some of these were put back to work immediately, although not necessarily on the same shift which they occupied before the strike. The first shift had been filled by permanent replacements, except for one job, and returning strikers were hired on the second shift on the basis of seniority and first in time to report to work. There was no third shift in December 1979.

Of the strikers who attempted to return, 28 (named in the first complaint) were not put back to work at that time. Separation notices of 25 strikers dated November 15 stated that they had been terminated for various alleged acts of misconduct. According to Industrial Relations Manager Lawler, however, the separations were not effectuated

until December 20, the day after the last bargaining session. It is clear nonetheless that the alleged discriminatees were not returned to work on December 10.

After the issuance of the first complaint (February 4, 1980), the Company offered all alleged discriminatees "positions of employment and reinstatement." It began a third shift, and the returning alleged discriminatees were returned to work on that shift, since the first and second shifts were filled. These employees gained no time for seniority and vacations until they reported for work in February 1980. Industrial Relations Manager Lawler credibly testified that third shift employees receive 15¢ more per hour than employees on other shifts doing the same work, that first and second shift vacancies existed after February 1980, and that there were third shift employees who did not bid for these vacancies although they were permitted to do so under plant rules.

The first complaint alleges that all 28 of the employees named therein were discriminatorily discharged because of their Union activities, and the second complaint alleges that 2 of these employees were also denied accrued vacation leave for the same reason.

The General Counsel's position at hearing was that the fact that the 28 discharged employees were strikers establishes a *prima facie* case of discriminatory motivation. In his brief the General Counsel appears to argue that the delay in time between the decision to fire certain strikers and the actual implementation of the discharges further establishes unlawful motive. The General Counsel further argues that the return of the 28 strikers to employment with the Company in February 1980 does not constitute "reinstatement."

The Company responds that the General Counsel has not established a *prima facie* case of discrimination, and points to the fact that it did take back some strikers on the day the strike ended. The Company acknowledges that, in past cases of discharge after extended absence, the notification of discharge was sent by mail, but contends herein that there was an inevitable delay because of the disruption of the strike, the strikers' unavailability during the strike, and the fact that Company policy on discharges required consultation among various supervisors before a decision could be made.

Of the 28 strikers that it did not take back until February 1980, the Company contends that 25 were discharged because of strike misconduct. Two were discharged because they refused different jobs at lesser pay which the Company offered them in lieu of their former jobs, which had been filled by permanent replacements. Even if these latter two discharges were "inappropriate," the Company further argues, the two employees have already received the maximum remedy allowable under Board law—placement on a preferential hiring list as economic strikers, and reemployment as soon as jobs became available. One striker, a probationary employee according to the Company, was discharged for alleged absenteeism.

The Company also alleges various events which compelled it to take protective and legal action. Thus, it contends that it suffered unusual property damage and suspected "sabotage" during the strike. Plant Manager McCollum stated that the blades of a "chipper"—a machine which converts pieces of wood into chips—were destroyed by a bullet which was found in the machine. A "gear box" was damaged because a "worm gear" was installed backwards. (Striker James Kelly, a maintenance expert, said this was impossible.)

Wires to a pump which controlled water to the boiler were cut, according to McCollum, which could have resulted in serious damage if the boiler exploded. Security Guard Richard Brown stated that he had a conversation at his father's house with striker Scott Fowler, who said that the boiler would not run when they tried to start it up. No water could get to the boiler when attempts were made to start it, and an investigation in which Brown participated determined that the wires were cut. (Fowler admitted a conversation with Brown at his father's house, but could not recall any discussion about the boiler.)

McCollum asserted that, after the strike began, nails and crates were found in the driveway, rocks were thrown, shots were fired in the plant, and there was mass picketing preventing access to the plant. After the cutting of the wires to the boiler pump, the Company hired a security dog service.

The Company also sought and obtained from a Georgia state court an injunction restraining the Union and individual strikers from engaging in various activities including damage to Company property, and sundry other alleged threats and intimidation.

The injunction also regulated the Union's conduct of picketing. Thus, the Union and individual strikers were enjoined *inter alia* from maintaining more than four pickets at any one time at an entrance to the Company's property, and from blocking or interfering with ingress and egress from Company property.

Following is a discussion of the factual issues in individual cases, including the evidence of alleged employee misconduct.

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### 3. *Alleged Employee Misconduct During the Strike*

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#### (e) *Landis Bishop/Jeffrey A. Hughes—Visiting Home of Nonstriking Employee and Threatening Him*

The separation notices state that the above-named employees visited the home of a nonstriking employee and threatened his family and property.

William A. Walker testified that he did not go on strike, that Bishop and Hughes visited him at his home, and that a conversation took place. The evidence indicates that the two employees stood outside an opened glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker said that Bishop and Hughes were drunk, cursed, and said that he was "screwing them out of their . . . damn money" by working during the strike. Bishop said that he would "take care of" Walker if he returned to work—a statement repeated by Hughes. Walker asked them to leave early in the conversation, but they took their time doing so.

Bishop said that he had been a Union steward, and that Walker was a probationary employee who had asked Bishop when he could become a Union member. He went to Walker's house to find out why he had returned to work. According to Bishop, Hughes had had only "one half of one beer," and the only improper language was the word "damn." Hughes said that Walker was "messing with a lot of other people's money." Walker asked whether they had come to threaten him, and Bishop denied it. However, Bishop stated that he told Walker that if he went back to work, he might be doing it at his own risk. Although neither Bishop nor Hughes would hurt him, other people might do so, according to Bishop.

I credit Walker's version of this incident, and find that the Company has established that Landis and Hughes threatened Walker with bodily injury.

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(g) *Preston D. Barlow—Abusive Language to Supervisor*

Barlow's termination notice states that he was discharged for abusive language on the picket line towards supervisors.

Industrial Relations Manager Lawler testified that, as she was crossing the picket line on the way to work one day, she heard Barlow refer to her as "that f----- bitch," and "that mother f-----, that ugly bitch." According to Lawler, Barlow referred to her as a "bitch" on another occasion. Barlow testified that he had a picket line conversation with Lawler, but could not remember, or did not think, that he made any such remarks.

Lawler was a more reliable witness. I credit her testimony, and find that the Company has established the conduct attributed to Barlow in his separation notice.

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5. *Legal Analysis of Alleged Section 8(a)(3) Violations*

(a) *The Issue of Discriminatory Motivation*

As described above, there were at least twice as many strikers as the 28 alleged discriminatees. This is based on Lawler's testimony that she saw about 60 pickets during the first days of the strike. If McCollum's estimate of 140 pickets is correct, the number of strikers compared to alleged discriminatees is even greater. The total employee complement was about 200.



Other than the alleged discriminatees, the strikers were put back to work on the second shift when the strike ended, with some exceptions who were placed on a preferential hiring list. There is no suggestion that any of these strikers were subjected to any unfair labor practices. The Company asserts that it singled out the 28 alleged discriminatees because of strike misconduct.

In similar circumstances, Board and court cases have concluded that absence of employer disciplinary action against some employees engaged in protected activity is evidence that disciplinary action against other such employees was not discriminatorily motivated.<sup>37</sup> I conclude that this evidentiary principle is determinative herein on the issue of the Company's motivation.

It may further be noted that there is a dearth of anti-union statements and action by the Company. All of the alleged independent violations of Section 8(a)(1) are without foundation and should be dismissed, except the Company's statement to employees that there was no formal grievance procedure. This latter statement was accurate in the sense that there was no existing contract at the time, and becomes a violation only because of the somewhat esoteric principle that the grievance procedure survives the expired contract. I conclude that the Company was simply unaware of this requirement, and that McCollum's statements reflected lack of knowledge and indecision,

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37. *Teledyne McCormack Selph, A Division of Teledyne, Inc.*, 246 NLRB No. 127 (1979); *Pedro's Inc. d/b/a Pedro's Restaurant*, 246 NLRB No. 92 (1979); *Triana Industries, Inc.*, 245 NLRB No. 161 (1979); *Bill Kraft's Restaurant Food Products Co.*, 241 NLRB No. 162 (1979); *J. Ray McDermott & Co., Inc.*, 233 NLRB 946 (1977); *B. F. Goodrich Co.*, 232 NLRB 1066 (1977); *Winn-Dixie Stores, Inc. v. N.L.R.B.*, 448 F.2d 8, 78 LRRM 2375 (4th Cir., 1971), enf. as mod. 181 NLRB 611 (1970); *Hyster Co. v. N.L.R.B.*, 480 F.2d 1081, 83 NLRB 2801 (5th Cir., 1973), enf. as mod. 198 NLRB 192 (1972).

rather than anti-union animus. This conclusion is buttressed by the fact that in all other respects the Company was quite scrupulous in its observation of employee rights—such as the policy of having a Union steward present during disciplinary interviews, where possible and where desired by the employee.

I find no merit in the General Counsel's argument that the Company's delay in notifying employees of their discharges is evidence of unlawful motive. The evidence is persuasive that Company disciplinary policy was consultative in nature, with final authority in some cases being exercised by Broughton Kelly. There is an inevitable delay in any such policy. There is also the fact that most of the dischargees were not present in the plant at the time of the alleged conduct warranting dismissal.

Finally, the Company delayed in such notification not because of any discriminatory motivation, but, rather, because it sought Union agreement on the subject of discipline of employees. Although the separation notices are dated November 15, the Company initially hoped to avoid conflict on this subject with the Union. Broughton Kelly said that he wanted to "get on board" with this subject, and first broached it in the December 3 negotiating session, as described above. At that date, according to his credible testimony, the Company was willing to consider discipline less than discharge. However, the Union failed to agree then and also failed to agree to the Company's December 19 Memorandum of Understanding incorporating the subject of discipline. The Company discharged the employees the following day, December 20, 1979. Rather than constituting evidence of unlawful motive, the Company's delay in discharging the employees evidences its desire to obtain accord with the Union on this subject.

The grounds which the Company sought to establish for Union approval of striker discipline further show that concern for misconduct rather than anti-union animus was the motivating force in the Company's action. Thus, it is quite clear that serious misconduct did occur. A gun was pointed at the plant manager, the wires to the boiler were cut, and a rock was thrown at a supervisor's car, to name a few. It is true that not all the Company's accusations of misconduct are warranted, and that it may not justifiably impute general misconduct to a specific employee absent proof involving that individual.<sup>38</sup> However, the rather widespread acts of violence and near violence, culminating in the state court injunction, suggest that the Company had a genuine problem, and that it was that problem rather than opposition to the Union which caused it to take the action that it did.

In the final analysis, the employees were discharged on December 20. Actually, the Company denied them work on December 10, at the time the other strikers returned and were put back to work. As previously indicated, I conclude that this action by the Company constituted disciplinary suspension of the employees on December 10, because of alleged misconduct during their exercise of protected activity, to wit, the strike.

It is established law that the discharge of an employee engaged in protected activity, for alleged misconduct which did not in fact occur, violates Section 8(a)(1) of the Act regardless of the employer's motivation.<sup>39</sup> Although the

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38. *American Cyanamid Co.*, 239 NLRB No. 60 (1978).

39. *N.L.R.B. v. Burnap & Sims, Inc.*, 379 U.S. 21 (1964); *Roadway Express, Inc.*, 250 NLRB No. 61 (1980). Where the employer proves an "honest belief" in the alleged misconduct, the burden then shifts to the General Counsel to establish that the employee did not in fact engage in such conduct or engaged in other conduct not sufficiently grave to warrant discharge. *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952).

discharges did not technically take place until December 20, 1979, there is no logical reason why the same principle should not apply to the disciplinary suspensions on December 10. These considerations make necessary a legal assessment of the individual acts of alleged misconduct described above.

(b) *Legal Analysis of Individual Misconduct*

1. *Violence and threats of violence*

Striker Scott Fowler's clenching his fist and pointing a gun at Plant Manager McCollum are serious acts of misconduct warranting discharge, and I so find.

As set forth above, the evidence establishes that striker Crosby Favors threw a rock which hit Supervisor Virgil Williams' car as the latter was passing through the picket line. The Board has concluded that discharges based on similar conduct were lawful,<sup>40</sup> and the same conclusion is warranted herein.

The credited evidence establishes that Landis Bishop and Jeffrey A. Hughes visited a nonstriking employee at his home and, in the presence of his family, threatened him with bodily injury if he returned to work. The Board and one Circuit Court of Appeals have decided that similar action warranted discharge of employees,<sup>41</sup> and I find that this principle is applicable to Bishop and Hughes.

As heretofore delineated, the only striker comment to job applicant Raymond Reeves which was threatening

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40. *Gold Kist, Inc.*, 245 NLRB No. 142 (1979); *Giddings & Lewis, Inc.*, 240 NLRB No. 64 (1979); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973); *Spotlight Company, Inc.*, 192 NLRB 491 (1971).

41. *Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408 (1975); *New Fairview Hall Convalescent Home*, *ibid.*; *N.L.R.B. v. Syncro Corp.*, 597 F.2d 922, 101 LRRM 2790 (5th Cir., 1979), *den'g. enf.* 234 NLRB 550 (1978).

was that of Crosby Favors, who said that he would not be responsible if something happened to Reeves, and that something might happen to his children. However, this threat was not alleged in Favors' separation notice, and therefore could not have been a cause of the Company's first suspending and then discharging him. In any event, I have already determined that Favors engaged in other misconduct warranting discharge.

Although the credited evidence shows that Joseph M. Williams made statements to other employees about supervisors "getting their asses whopped," and similar statements, he did not make these statements directly to supervisors. I therefore find that Williams did not make threatening statements to supervisors warranting discharge, as alleged in his separation notice.

## 2. *Obscene and abusive language*

Industrial Labor Relations Manager Barbara Lawler heard Preston D. Barlow make the profane statements about her, described above, as she drove through the picket line.

Board cases on employee profanity to supervisors as grounds for discharge come down on both sides of the issue. On the one hand, it is held that such language is customary in industrial settings.<sup>42</sup> There are, however, cases which conclude that profane language to supervisors constitutes misconduct of sufficient gravity to warrant disciplinary action.<sup>43</sup>

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42. *Vaa Guard Carpet Mills*, 246 NLRB No. 106 (1979), *Publisher's Printing Co., Inc.*, 246 NLRB No. 36 (1979).

43. *Rockland Chrysler Plymouth, Inc.*, 209 NLRB 1045 (1974). See also *Atlantic Steel Co.*, 245 NLRB No. 107 (1979), where the Board overruled the Administrative Law Judge on this issue and deferred to an arbitrator's award.

Some cases appear to make distinctions based on the sex of the employee or supervisor involved, considering offensive remarks to be more opprobrious if made to a female.<sup>44</sup> One Circuit Court of Appeals described similar language, and an overt gesture, as "vulgar and offensive by any standard of decency."<sup>45</sup>

I find that Barlow's statements about a supervisor, made within her hearing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge. In making this determination, I take into account the minimal anti-union animus on the part of the Company, and the consequent likelihood that it was Barlow's statements rather than his strike activity which precipitated the Company's action.

The facts involving Joseph M. Williams' statements about Lawler and Eley require a different conclusion, however. Neither Lawler nor Eley heard the statements, which were made to other employees on the morning of November 15 a few minutes before the strike began, in an atmosphere of turbulence. It is obvious that offensive remarks have greater impact if made to, or heard by, the person about whom they are made. I conclude that Williams' remarks about Lawler and Eley, not heard by either of them, were not serious enough to justify his discharge.

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#### 5. *Summary of misconduct cases*

For the reasons given above, I find that strikers Scott Fowler, Crosby Favors, Landis Bishop, Jeffrey A. Hughes, and Preston D. Barlow engaged in strike misconduct,

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44. *Veeder-Root Co.*, 192 NLRB 973 (1971).

45. *Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815, 94 LRRM 2225, 2228 (5th Cir., 1977), den'g. enf. 220 NLRB 1127 (1975).

known by the Company prior to their discharges, of sufficient gravity to warrant such discipline. I also find that none of the other alleged discriminatees charged by the Company with misconduct<sup>49</sup> actually engaged in same.

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### Conclusions of Law

1. Georgia Kraft Company, Woodcraft Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' Local Union No. 246 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Company committed unfair labor practices in violation of Section 8(a) (1) of the Act:

(a) Telling employees that there was no formal grievance procedure, where such employees had been subject to a recently expired collective-bargaining agreement which contained such procedure.

(b) Discharging strikers Clarence Watson and Wiley Shepherd on December 20, 1979, for refusal to accept jobs which were not substantially equivalent to their former jobs.

(c) Suspending on December 10, 1979, and discharging on December 20, 1979, the following-named employees for engaging in alleged strike misconduct warranting such discipline, when in fact the employees had not engaged in same:

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49. Kenneth V. Palmer, Phillip J. Faulkner, Charles Brown, James Kelly, Jerry Kirbo, John Ward, Mary Burth, Robert Barry McCoy, Anthony Crouch, Eulice Favors, Cecil Barber, Carlene Frost, Yvonne Blalock, James O'Neal, Joseph M. Williams, Robin O. Boudrie, Michael W. Buttram, Robert L. Russell, Donald Ray Thrash, Stephen C. Smith.



Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robert Barry McCoy	Robert L. Russell

4. By failing and refusing to pay accrued vacation pay to Carlene Frost and Mary Burth, without adequate business justification for such refusal, the Company violated Section 8(a) (3) and (1) of the Act.

5. By insisting to impasse that the Union agree (a) to withdraw charges previously filed with the National Labor Relations Board and the courts, and (b) to the discharge of employees for alleged misconduct in which they had not in fact engaged, the Company thereby insisted on non-mandatory subjects of bargaining in violation of Section 8(a) (5) and (1) of the Act.

6. The Company has not engaged in any other unfair labor practices.

#### IV. The Remedy

It having been found that the Company has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Company violated Section 8(a) (1) of the Act by the suspension and/or dis-



charge of the employees named in Conclusions of Law 3(b) and 3(c), the Company shall be ordered to make them whole for any loss of pay or other benefits they may have suffered as a result of their unlawful suspensions and/or discharges.

As for the employees listed in Conclusions of Law 3(c), who were discharged for alleged misconduct, but who were returned to work in February 1980, the Company shall be ordered to pay them backpay with interest<sup>68</sup> from the time of their disciplinary suspensions on December 10, 1979, until the time of their return to employment in February 1980,<sup>69</sup> and to credit their employment records for the same period with working time for vacation and seniority purposes.

The Company shall also be ordered to credit for such purposes the employment records of Clarence Watson and Wiley Shepherd from December 20, 1979, the date of their unlawful discharges, until the dates of their return to employment. In addition, the Company shall be ordered to reconstruct, on a daily basis, its personnel records since the time of their discharges, for the purpose of establishing whether any substantially equivalent job became available for either of them prior to the time when he returned to employment with the Company. In the event that such reconstruction of personnel records establishes that there was such prior job, and that the Company would have hired Watson or Shepherd, in the order and according to the method which it was then utilizing, had such employee been on a preferential hiring list, then the Company shall be ordered to make such employee whole by paying him backpay from the date of availability of such job to the

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68. See *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1982).

69. *Roadway Express, Inc.*, *supra*, fn. 39 (sl. op., p. 8, fn. 7).

date he returned to employment with the Company, with interest.<sup>70</sup>

It having been found that the Company unlawfully failed and refused to pay Carlene Frost and Mary Burth accrued vacation pay in violation of Section 8(a)(3) and (1) of the Act, the Company shall be ordered to pay said vacation pay to them, with interest from the date that such vacation pay would normally have been paid.<sup>71</sup>

It having been found that the Company has refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom, and, upon request, bargain with the Union.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

#### ORDER<sup>72</sup>

Georgia Kraft Company, Woodcraft Division, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Telling its employees that there is no grievance procedure.

(b) Suspending, discharging, or otherwise disciplining employees for alleged misconduct in which they have not engaged.

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70. *Supra*, fn. 68.

71. *Ibid*.

72. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Discharging employees for refusal to accept jobs which are not substantially equivalent to their former jobs.

(d) Failing and refusing to pay accrued vacation pay to employees who are entitled to same; or

(e) Refusing to bargain in good faith with Laborer's Local Union No. 246.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay each of the following listed employees back-pay from December 10, 1979, until such time as he or she returned to employment with the Company, in the manner set forth in the section of this Decision entitled "The Remedy," and credit the employment record of each such employee, for such period, with working time for seniority and vacation purposes:

Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robert Barry McCoy	Robert L. Russell

(b) Credit the employment records of Clarence Watson and Wiley Shepherd with working time from December 20, 1979, until such time as each of them returned to employment with the Company, for seniority and vacation purposes.

Prepare and submit to the Regional Director for Region 10 a reconstructed daily record of available jobs and names of incumbents holding such positions, including the date of their hire, and vacancies, if any, for the same period indicated above.

In the event that such reconstructed record shows that the same job held by Watson or Shepherd, or a substantially equivalent one, became available prior to the time such employee was rehired, make him whole for any loss of pay he may have suffered by reason of the Company's unlawful discharge of him, in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Make whole Carlene Frost and Mary Burth by paying each of them two weeks' vacation pay for 1979, to the extent that they have not already received same, with interest as set forth in the section of his Decision entitled "The Remedy."

(d) Upon request, bargain with Laborers' Local Union No. 246, and, if agreement is reached, embody same in a written agreement.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the extent of the Company's actions required to comply with this Order, and the amount of backpay due.

(f) Post at its plant at Greenville, Georgia copies of the attached notice marked "Appendix."<sup>73</sup> Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by the Company's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply therewith.

IT IS ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found.

Dated at Washington, D.C. December 18, 1980.

/s/ Howard I. Grossman  
Howard I. Grossman  
Administrative Law Judge

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73. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

## APPLICABLE STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act ("Act") (29 U.S.C. § 151 et seq.) are as follows:

1. Section 7 of the Act (29 U.S.C. § 157) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

2. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) provides:

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

3. Section 8(c) of the Act (29 U.S.C. § 158(c)) provides:

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

4. Section 8(d) of the Act (29 U.S.C. § 158(d)) provides:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal to require the making of a concession.

5. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in pertinent part:

The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or

in part the order of the Board . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive.

6. Section 10(f) of the Act (29 U.S.C. § 160(f)) provides in pertinent part:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside . . . . Upon filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.



DEC 29 1983

ALEXANDER L. STEVAS,  
~~CLERK~~

No. 83-103

---

# In the Supreme Court of the United States

October Term, 1983

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WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD and  
LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, AFL-CIO, LOCAL 246,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

---

## JOINT APPENDIX

---

J. ROY WEATHERSBY  
(Counsel of Record)

1100 C&S National Bank Bldg.  
35 Broad Street, N.W.  
Atlanta, Georgia 30335  
(404) 572-6600

*Counsel for Petitioner*

REX E. LEE

Solicitor General

Department of Justice  
Washington, D.C. 20530  
(202) 633-2217

*Counsel for Respondent*

Of Counsel:

POWELL, GOLDSTEIN, FRAZER & MURPHY

1100 C&S National Bank Bldg.  
35 Broad Street, N.W.  
Atlanta, Georgia 30335

**Petition For Certiorari Filed July 7, 1983**

**Certiorari Granted November 14, 1983**

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\*The numbers in brackets refer to the page at which the testimony appeared in the trial transcript.

## II

appear in the Appendix to the printed Petition for Certiorari:

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**RELEVANT DOCKET ENTRIES BEFORE THE  
NATIONAL LABOR RELATIONS BOARD AND  
THE UNITED STATES COURT OF APPEALS  
FOR THE 11TH CIRCUIT**

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12-14-79	Charge filed in 10-CA-15293
1-29-80	Second Amended Charge in 10-CA-15293
2-4-80	Order Consolidating Cases, Complaint and Notice of Hearing
2-15-80	Georgia Kraft's Answer
7-14-80	Hearing
7-18-80	
12-18-80	Administrative Law Judge's Decision
2-2-81	General Counsel's Exceptions
2-2-81	Georgia Kraft's Exceptions
2-12-81	Georgia Kraft's Answering Brief
9-30-81	Decision and Order of the National Labor Relations Board
10-21-81	Georgia Kraft's Petition for Review of the NLRB Order
11-25-81	General Counsel's Cross Application For Enforcement
1-25-82	Georgia Kraft's Brief
4-7-82	General Counsel's Brief
4-23-82	Georgia Kraft's Reply Brief
8-31-82	Oral Argument

- 1-24-83      Decision, United States Court of Appeals for  
                 the 11th Circuit
- 2-11-83      Georgia Kraft's Petition for Rehearing With  
                 Suggestion for Rehearing En banc
- 4-8-83       Order Denying Petition for Rehearing
- 7-7-83       Georgia Kraft's Petition for Writ of Certiorari  
                 to the United States Court of Appeals for  
                 the 11th Circuit
- 10-21-83     Brief For the National Labor Relations Board  
                 in Opposition
- 11-14-83     Order of the Supreme Court of the United  
                 States Granting Certiorari

FORM NO. 10-107 10-77	UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD <b>CHARGE AGAINST EMPLOYER</b>	FORM EMPLOYER UNDER NO. 10-107		
<b>INSTRUCTIONS:</b> Fill in originals & copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.		DO NOT WRITE IN THIS SPACE Case No. <b>10-CA-13273</b> Date Filed <b>12-14-79</b>		
<b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>				
a. Name of Employer <b>Woodkraft Division/Georgia Kraft Company</b>		b. Number of Workers Employed <b>Approx. 175</b>		
c. Address of Establishment (street no., number, city, State, and ZIP code) <b>Rt. 3, Box 10, Greenville, Ga. 30222</b>	d. Employer Representative in Charge <b>Garnett McCullum, Mgr.</b>	e. Phone No. <b>404/627-4257</b>		
f. Type of Establishment (factory, mine, wholesaler, retail) <b>Factory/Saw Mill</b>	g. Identify Principal Products or Service <b>Lumber and Chip Products</b>			
h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.				
i. Basis of the Charge (be specific as to facts, names, addresses, plants involved, dates, places, etc.) <p>On or about and after December 9, 1979, the Employer discriminated against the below named employees in regard to their tenure of employment in an effort to discourage membership.</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;">           1. Landis Bishop            2. Scott Fowler            3. Ken Palmer            4. Jack Faulkner            5. Glene Brown            6. Charles Brown            7. James Kelly            8. Chuck Prather            9. Jerry Kirbo            10. Douglas Barlow            11. James Nixon            12. Jeff Hughes            13. John Ward            14. Mary Burth            15. Barry McCoy            16. Anthony Crouch         </td> <td style="width: 50%; vertical-align: top;">           17. Eulice Favors            18. Cecil Barber            19. Carlene Frost            20. Yvonne Blalock            21. Jimmy O'Neal         </td> </tr> </table>			1. Landis Bishop 2. Scott Fowler 3. Ken Palmer 4. Jack Faulkner 5. Glene Brown 6. Charles Brown 7. James Kelly 8. Chuck Prather 9. Jerry Kirbo 10. Douglas Barlow 11. James Nixon 12. Jeff Hughes 13. John Ward 14. Mary Burth 15. Barry McCoy 16. Anthony Crouch	17. Eulice Favors 18. Cecil Barber 19. Carlene Frost 20. Yvonne Blalock 21. Jimmy O'Neal
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By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.				
j. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number) <b>Laborers' Local Union No. 246</b>				
k. Address (Street and number, city, State, and ZIP code) <b>P. O. Box 2542, Columbus, Georgia 31902</b>		4b. Telephone No. <b>404/327-6224</b>		
l. Full Name of the local, national, or labor organization to which the charge is filed (If no labor organization, list the person to whom charge is filed) <b>Laborers' International Union of North America, IFL-CLC</b>				
<b>6. DECLARATION</b>				
I declare that I am a member of the Laborers' Union, and that the foregoing charges are true and correct to the best of my knowledge and belief. By: <u>Charles L. Bar</u> Signature of representative of person filing charge <b>1961 North Druid Hills Road,          N. E., Suite 201A, Duncan          Square, Atlanta, Ga. 30324</b>				
Address <u>404/325-0036</u> (Telephone number)		Date <u>December 12, 1979</u> (Date)		
WILL SIGN STATEMENT ON THIS CHARGE AND WILL NOT SIGN ANY OTHER CHARGE (SEE INSTRUCTIONS)				
SECTION 1002				

FORM NO. 10-101 1-7-72	UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD	FORM C-500 (REV. 1-7-72)		
<b>SECOND AMENDED CHARGE AGAINST EMPLOYER</b>				
<b>INSTRUCTIONS:</b> Fill an original and 4 copies of this report with NLRB regional director for the region in which the charged employer practices its trade or commerce.		DO NOT WRITE IN THESE SPACES Case No. <b>10-CA-13793</b> Date Filed <b>1-29-80</b>		
<b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>				
a. Name of Employer: <b>Woodcraft Division/Georgia Kraft Company</b>	b. Number of Employees (Full-time): <b>Approx. 175</b>			
c. Address of Establishment (Factory, store, warehouse, etc.), State, and ZIP code: <b>Rt. 3, Box 10, Greenville, GA 30222</b>	d. Employer's Representative (Name, Title, and Telephone Number): <b>Garrett McCulloch, P.E., Mgr. (404) 627-6255</b>			
e. Type of Establishment (Factory, store, warehouse, etc.): <b>Factory/Saw Mill</b>	f. Products Produced or Services: <b>Lumber and ship products</b>			
g. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of sections 8(a) subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of (c) (1) (A).				
h. Basis of the Charge (Be specific as to facts, names, addresses, places involved, dates, places, etc.): <p>On or about and after December 9, 1979, the Employer discriminated against the below-named employees in regard to their tenure of employment in an effort to discourage membership.</p> <table style="width: 100%; border: none;"> <tr> <td style="vertical-align: top; width: 50%;">           1. Lendie Bishop            2. Brett Fowler            3. Rex Palmer            4. Jack Fambauer            5. Charles Brown            6. James Kelly            7. Jerry Kirby            8. Douglas Barlow            9. Jeff Burdick            10. John Ward            11. Mary Smith            12. Barry McGee            13. Anthony Crouch         </td> <td style="vertical-align: top; width: 50%;">           14. Buline Favore            15. Cecil Barber            16. Carlene Frost            17. Thomas Blalock            18. Jimmy O'Neal            19. Mike Williams            20. Crosby Favore            21. Terri Boudon            22. Robin O. Boudrie            23. Michael Buttram            24. Robert L. Russell            25. Steven C. Smith            26. Donald Thrash            27. Wiley Shepard            28. Clarence Watson         </td> </tr> </table>			1. Lendie Bishop 2. Brett Fowler 3. Rex Palmer 4. Jack Fambauer 5. Charles Brown 6. James Kelly 7. Jerry Kirby 8. Douglas Barlow 9. Jeff Burdick 10. John Ward 11. Mary Smith 12. Barry McGee 13. Anthony Crouch	14. Buline Favore 15. Cecil Barber 16. Carlene Frost 17. Thomas Blalock 18. Jimmy O'Neal 19. Mike Williams 20. Crosby Favore 21. Terri Boudon 22. Robin O. Boudrie 23. Michael Buttram 24. Robert L. Russell 25. Steven C. Smith 26. Donald Thrash 27. Wiley Shepard 28. Clarence Watson
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i. The above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act.				
j. Full Name of Party Filing Charge (If labor organization, give full name, including local, state and national): <b>Laborers' Local Union No. 266</b>				
k. Address (Street and number, city, State, and ZIP code): <b>P. O. Box 2542, Columbus, Ga. 31902</b>		l. Telephone No.: <b>(404) 327-6626</b>		
m. Full Name of National or International Labor Organization of which the filer is an affiliate or representative, and which is the authorized bargaining agent: <b>Laborers' International Union of North America, AFL-CIO</b>				
<b>6. DECLARATION</b>				
n. I, <u>Charles L. Barnes</u> , Business Manager, Laborers' Dist. Council of Georgia/South Carolina		o. I declare under penalty of perjury that the foregoing is true and correct.		
p. Executed on this <u>1st</u> day of <u>February</u> , 1980, at <u>Atlanta, Georgia</u> . <b>Charles L. Barnes</b> 1961 North Druid Hills Road, N.E. Suite 201-A, Dunwoody Square Atlanta, Georgia 30329		q. Executed on this <u>1st</u> day of <u>February</u> , 1980, at <u>Atlanta, Georgia</u> . <b>(404) 327-0958</b> (Typed Name)		
r. I declare under penalty of perjury that the foregoing is true and correct.				

(February 4, 1980)

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 10

---

CASES 10-CA-15289  
10-CA-15293

---

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY  
and  
LABORERS' LOCAL UNION NO. 246

---

**ORDER CONSOLIDATING CASES, COMPLAINT  
AND NOTICE OF HEARING**

It having been charged in Cases 10-CA-15289 and 10-CA-15293, by Laborers' Local Union No. 246, herein called the Union, that Woodkraft Division/Georgia Kraft Company, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned, having duly considered this matter and it being deemed necessary to consolidate said cases in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay;

IT IS HEREBY ORDERED, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.



Upon said charges, the General Counsel of the Board, on behalf of the Board, by the undersigned, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

## 1.

A copy of the charge in Case 10-CA-15289, filed on December 12, 1979, was served upon Respondent by registered mail on December 14, 1979.

A copy of the charge in Case 10-CA-15293, filed on December 14, 1979, was served upon Respondent by registered mail on December 14, 1979. A copy of the amended charge in Case 10-CA-15293, filed on January 7, 1980, was served upon Respondent by registered mail on January 9, 1980. A copy of the second amended charge in Case 10-CA-15293, filed on January 29, 1980 was served upon Respondent by registered mail on January 31, 1980.

## 2.

Respondent is, and has been at all times material herein, a Delaware corporation, with an office and place of business located at Greenville, Georgia, where it is engaged in the operation of a lumber mill.

## 3.

Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped from its Greenville, Georgia facility finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia.

## 4.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## 5.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## 6.

On November 15, 1979, employees of Respondent concertedly ceased work and engaged in a strike.

## 7.

On or about December 9, 1979, the strike described in paragraph 6 was terminated and the Union, on behalf of the striking employees, made unconditional application with Respondent to return to work.

## 8.

Respondent, on or about December 10, 1979, discharged and thereafter failed and refused to reinstate its following-named employees:

Landis Bishop	-	Scott Fowler
Ken Palmer	-	Jack Faulkner
Charles Brown	-	James Kelly
Jerry Kirbo	-	Douglas Barlow
Jeff Hughes	-	John Ward
Mary Burth	-	Barry McCoy
Anthony Crouch	-	Eulice Favors
Cecil Barber	-	Carlene Frost
Yvonne Blalock	-	Jimmy O'Neal
Mike Williams	-	Crosby Favors
Terri Bowden	-	Robin O. Boudrie
Michael Buttram	-	Robert L. Russell
Steven C. Smith	-	Donald Thrash

8

9.

Respondent, on or about December 20, 1979, discharged and thereafter failed and refused to reinstate its employees Wiley Shepard and Clarence Watson.

10.

Respondent discharged and thereafter failed and refused to reinstate its employees as alleged in paragraphs 8 and 9 above because of their membership in, and activities on behalf of, the Union, and because they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection.

11.

All production and maintenance employees including plant clericals and team leaders employed by the Respondent at its Greenville, Georgia facility, but excluding all office clerical employees, salesmen, technical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

12.

On September 22, 1977, in an election by secret ballot conducted under the supervision of the Regional Director for the Tenth Region of the Board, a majority of the employees in the unit described in paragraph 11 above, designated and selected the Union as their representative for the purpose of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

13.

On September 30, 1977, the Regional Director for the Tenth Region of the Board certified the Union as the exclusive collective bargaining representative of all the employees in the unit described in paragraph 11 above.

14.

At all times since September 30, 1977, the Union has been, and is, the representative of a majority of the employees in the unit described in paragraph 11 above for the purposes of collective bargaining and, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees in said unit for the purposes of collective bargaining.

15.

A collective bargaining agreement between Respondent and the Union, and which embodied the rates of pay, wages, hours of employment and other terms and conditions of employment of the employees described in paragraph 11 above was effective from January 1, 1978, until October 31, 1979.

16.

On or about July 26, 1979, the Union timely notified Respondent that it desired to modify and renegotiate the terms and conditions of the collective bargaining agreement alleged in paragraph 15 above, effective upon its expiration.

17.

On or about September 9, 1979, Respondent and the Union commenced negotiations concerning terms and con-

ditions of a new collective bargaining agreement embodying the rates of pay, wages, hours of employment and other terms and conditions of employment of the employees described in paragraph 11 above.

## 18.

On or about December 9, 1979, Respondent and the Union agreed to the terms of a collective bargaining agreement, embodying the rates of pay, wages, hours of employment and other terms and conditions of employment of the employees in the unit described in paragraph 11 above.

## 19.

Respondent, on or about December 11, 1979, refused, and has continued to refuse, to execute the agreed upon collective bargaining agreement described in paragraph 18 above.

## 20.

The acts of Respondent alleged in paragraph 19 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## 21.

The acts of Respondent alleged in paragraphs 8, 9 and 10 above constitute unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

**PLEASE TAKE NOTICE** that on the 14th of July, 1980, at 10:00 a.m., Eastern Daylight Time, and consecutive days thereafter until concluded, at the Federal Building and Post Office, Newnan, Georgia, a hearing will be con-

ducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form. NLRB-4668, Summary of Standard Procedures in Formal Hearings held before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the Regional Director acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Atlanta, Georgia, this 4th day of February, 1980.

/s/ Curtis L. Mack  
Curtis L. Mack, Regional Director  
National Labor Relations Board  
101 Marietta Tower, Suite 2400  
101 Marietta Street, N.W.

(February 15, 1980)

UNITED STATES OF AMERICA BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 10

---

CASES 10-CA-15289  
10-CA-15293

---

WOODKRAFT DIVISION/GEORGIA  
KRAFT COMPANY

and

LABORERS' LOCAL UNION NO. 246

---

**ANSWER TO COMPLAINT**

Comes now Georgia Kraft Company - Woodkraft Division, Respondent in the above captioned matter, and through its undersigned attorneys files this its Answer to the Complaint.

**FIRST DEFENSE**

1. Respondent is without knowledge as to when the charge was filed as alleged in paragraph 1 of the Complaint but admits it received a copy of the charge as alleged.
2. Respondent admits the allegations contained in paragraphs 2, 3 and 4 of the Complaint.
3. Respondent denies the allegations of paragraph 5 of the Complaint.
4. Respondent admits that employees refused to work on November 15, but is without knowledge as to whether

or not they were engaged in a strike as alleged in paragraph 6 of the Complaint.

5. Respondent denies the allegations of paragraphs 7, 8, 9, and 10 of the Complaint.

6. Respondent admits the allegations of paragraphs 11, 12 and 13 of the Complaint.

7. Respondent is without knowledge as to the allegations and conclusions of law set forth in paragraph 14 of the Complaint.

8. Respondent admits the allegations set forth in paragraph 15 of the Complaint.

9. Respondent is without knowledge as to the allegations and conclusions of law set forth in paragraphs 16 and 17 of the Complaint.

10. Respondent denies the allegations in paragraphs 18, 19, 20 and 21 of the Complaint.

## SECOND DEFENSE

All employees listed in paragraph 8 of the Complaint have been offered unconditional offers of reinstatement and all but three (3) are presently employed by Respondent. Because they engaged in misconduct during the period they were on strike, the time they were off from the date of their reinstatement to the date they may otherwise have been re-employed by Respondent is considered a disciplinary suspension.

## THIRD DEFENSE

On December 10, 1979, Respondent received a telegram from the Laborers' International Union of North America, Local Union 246 stating that they accepted Re-



spondent's offers made at a meeting on December 3, 1979. One of the offers made at that meeting listed 19 of the employees named in paragraph 8 of the Complaint as strikers who had engaged in misconduct. Respondent submitted this list in writing and requested that they all be discharged because of their misconduct. Local Union 246's telegram accepted this proposal by Respondent and Respondent was entitled to rely upon their agreement in taking disciplinary action against those named individuals.

Respectfully submitted,

Powell, Goldstein, Frazer & Murphy

/s/ J. Roy Weathersby

J. Roy Weathersby

Attorneys for Respondent, Georgia

Kraft Company

1100 C&S National Bank Building

35 Broad Street

Atlanta, Georgia 30303

(404) 572-6639

(December 18, 1980)

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
BRANCH OFFICE  
ATLANTA, GEORGIA

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CASES 10-CA-15289  
10-CA-15293  
10-CA-15564

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GEORGIA KRAFT COMPANY WOODCRAFT DIVISION<sup>1</sup>  
and  
LABORERS' LOCAL UNION NO. 246

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*Robert G. Levy, II, Esq.,*  
for the General Counsel.

*J. Roy Weathersby, Esq., and*  
*John N. Raudabaugh, Esq., (Powell,*  
*Goldstein, Frazer & Murphy) for*  
*the Company.*

*Mr. Charles R. Barnes, for the*  
*Union.*

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1. The formal papers in Cases 10-CA-15289 and 10-CA-15293 state the Company's names as "Woodcraft Division/Georgia Kraft Company", while the charge in Case 10-CA-15564 gives the name indicated above. Although the second complaint uses both names, the contract between the Company and the Union shows the above-captioned name to be correct (G.C. Exh. 2).

## DECISION

### Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge: This case was tried in Newnan, Georgia, on July 14 through 18, 1980. The charge in Case 10-CA-15289 was filed on December 12, 1979, and the charge in Case 10-CA-15293 on December 14, 1979, by Laborers' Local Union No. 246 (herein the Union). An amended charge in Case 10-CA-15293 was filed by the Union on January 7, 1980, and a second amended charge on January 29, 1980. An order consolidating cases and complaint (herein the first complaint) were issued on February 4, 1980. The charge in Case 10-CA-15564 was filed by the Union on March 4, 1980, and a complaint (herein the second complaint) and an order consolidating cases were issued on April 18, 1980.

The complaints allege that Georgia Kraft Company/Woodcraft Division<sup>2</sup> (herein the Company) violated Section 8(a) (1) of the National Labor Relations Act (herein the Act) by (1) interrogating its employees concerning their Union sympathies and activities; (2) telling them that (a) they could not file grievances, (b) they could no longer have a Union steward present at disciplinary interviews because the Union no longer existed, (c) there was nothing they could do about written warnings because there was no union and no contract, (d) the Company would not sign a contract with the Union, and (e) the Company would bypass the Union in processing employee grievances; (3) denying an employee's request for Union representation during interviews which the employee had reasonable cause to believe would result in disciplinary action; (4) conducting such interviews notwithstanding its refusal to permit such representation; and (5) dis-

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2. *Ibid.*

charging and thereafter failing to reinstate an employee as a result of such interviews.

The complaints also allege that the Company violated Section 8(a)(3) and (1) of the Act by discharging and thereafter failing to reinstate 28 named employees, and by refusing to pay accrued vacation pay to two of them, because said employees engaged in concerted activities for mutual aid and protection.

Finally, the complaint in Cases 10-CA-15289 and 10-CA-15293 alleges that the Company violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective-bargaining agreement to which the parties had agreed.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs from the General Counsel and the Company, I make the following:

### Findings of Fact

#### I. Jurisdiction

The Company is a Delaware corporation with an office and place of business at Greenville, Georgia, where it is engaged in the operation of a lumber mill. During calendar year 1979, which period is representative of all times material herein, the Company sold and shipped from its Greenville, Georgia, facility finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. The Labor Organization Involved

The Company admits, and I find, that the Union is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

### III. The Alleged Unfair Labor Practices

#### A. *The Alleged Violation of Section 8(a)(5)*

##### 1. *The Bargaining History and Intervening Strike*

The Union was certified as the representative of the Company's production and maintenance employees on September 30, 1977, and the parties thereafter entered into a collective-bargaining agreement effective from January 1, 1978, until October 31, 1979. In July 1979, the Union timely notified the Company that it wished to modify and renegotiate the terms of the agreement.

The first negotiating session was held on September 11, 1979, the principal representatives being Charles R. Barnes for the Union and Broughton Kelly for the Company. The parties made proposals on a variety of subjects, but had not reached agreement by October 31, the end of the contract term. By agreement of the parties, the contract was extended to November 15, 1979, but the parties had still not reached agreement, and on that date the Union called a strike. According to Union Representative Barnes, the parties had reached "final positions" on a number of issues in meetings on November 6, 14, and 27, 1979.

The next meeting was held on November 29, 1979. The Union's representative was Howard Henson, Regional Manager for the Laborers' International Union. Although Henson was not called as a witness, the parties stipulated that he would have testified that he explained to Company representative Kelly that he was there to see whether "some movement could be made."

Henson and Kelly met again on December 3, 1979, and discussed seniority and the Company's desire to reorganize departments. Henson said that he would take the Company's proposal back to the Union committee.

Kelly also informed Henson, according to the latter's stipulated testimony, that he did not wish to deceive him, and handed him a list of strikers whom the Company intended to discharge. Henson replied that he would not discuss anything about firing strikers.

Kelly testified that he told Henson the employees had engaged in misconduct, warranting some kind of disciplinary action. According to Kelly, the Company had made no decision as of December 3, and would have considered some kind of discipline less than discharge.

On December 9, the Union sent a telegram to the Company reading as follows:

"THIS IS TO ADVISE YOU THAT THE LAST COMPANY OFFER PRESENTED ON DECEMBER 3, 1979, HAS BEEN ACCEPTED AS A FINAL AND BINDING CONTRACT ALL EMPLOYEES WHO COULD BE CONTACTED WILL RETURN BACK TO WORK ON THEIR REGULARLY ASSIGNED SHIFTS EFFECTIVE DECEMBER 10, 1979 WE ARE PREPARED TO MEET AT YOUR CONVENIENCE TO SIGN THE AGREEMENT."

The strike ended the following day, December 10, and the strikers came back to the plant, but the Company did not allow all of them to return to work, as described hereinafter.

Kelly responded to the Union telegram by letter dated December 11, stating that several matters had to be resolved before there was agreement on a contract, and that this might be accomplished in one more meeting. The letter mentions the handling of strikers who had been replaced but who desired their jobs back, employees who allegedly had engaged in misconduct, and a pending "lawsuit" against the Company. Barnes also sent Kelly a letter

on the same date, asking for a meeting "to finalize the language and sign the Agreement."

The parties met again on December 19, with the intervention of a Federal mediator. Barnes returned as the principal Union representative instead of Henson, and Kelly continued for the Company. Kelly gave Barnes a proposed "Memorandum of Agreement" with 20 proposals, 2 of which are that the discharges of employees "who have been terminated" are to be "final and binding" upon the Union, and that the Union agree to withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts against the Company or its employees."

Barnes stated that he had not engaged in any prior discussion with Kelly about discharging employees, although he acknowledged seeing a list of employees to be discharged which had been given to Henson (by Kelly on December 3). Barnes testified that he told Kelly that the employees were not guilty of the offenses with which they were charged.

Barnes was asked on cross-examination whether the Union's December 9 telegram, accepting the Company's December 3 offer, meant that the Union was accepting the Company's proposal to discharge employees. The Union representative replied that Kelly's statement to Henson on December 3 about discharging employees was not a "proposal", but, rather, was something the Company had already decided to do, and was not subject to bargaining. According to Barnes, the only "proposal" was the Company's position on departmental reorganization and progression of jobs, and it was this offer, plus all of the Company's previously stated positions, which the Union intended to accept by its December 9 telegram. Barnes stated that these positions had become fixed as of No-

vember 6, and had remained the same through the November 14 and 27 meetings.

The December 19 meeting concluded, according to Barnes, with Kelly saying that the Union would have to sign the Memorandum of Agreement, to which Barnes replied that he would not sign an agreement to discharge 20 employees. Kelly then received a telephone call, said that a decertification petition had been filed, and that the Company was not going to sign an agreement.

Kelly testified that the Memorandum of Agreement contained some subjects which were new, and others which had been covered previously. These were items "of concern" to Kelly, and he wanted "to get them straightened out." He obtained Barnes' agreement on some of the items but failed to reach an accord on others, including the provision for firing strikers.

The Company representative stated that he received a message during the meeting to the effect that a decertification petition had been filed, and that he informed the Union representatives of this fact. Kelly denied telling the Union that he would not sign an agreement under these circumstances. Instead, he informed the Union that he did not think the negotiations should continue with the decertification petition "hanging over our heads." (The petition was later dismissed.)

I credit Kelly's account of his reaction to the news of the decertification petition. However, I also credit Barnes' uncontradicted testimony that Kelly demanded that the Union agree to the terms in the Memorandum of Agreement, that Barnes refused to agree to the firing of strikers, and that the discussion of the decertification petition took place thereafter.

On February 22, 1980, Kelly wrote to Barnes that the Company had implemented its December 3 proposal on



Company reorganization of departments, but was experiencing morale problems because of employee opposition to changes in shifts. Accordingly, Kelly suggested a change in the Company proposal. Barnes answered by telegram dated February 29, 1980, that the parties had a valid contract, and that the Union objected to any unilateral change. Kelly responded by letter dated March 3, 1980, to the effect that there was no contract. He noted that the Union had not submitted any document which the Company could sign—and suggested as the reason the fact that there were unresolved issues between the parties.

By letter of March 12, 1980, Barnes repeated the Union's opposition to any "modification of the language of our Agreement," and stated that the Agreement was "completely typed" and ready for signature. Kelly answered two days later, on March 14, 1980, with a request for a copy of the "alleged" agreement, and a restatement of the Company's position. On March 31, 1980, he wrote that he had not yet received a copy, and asked that it be sent as soon as possible. Kelly's letter avers that the Union's "continued refusal to forward a copy of the contract is . . . bad faith bargaining."

Barnes replied to Kelly by letter dated April 9, 1980, and apologized for the delay in his response, which he attributed to an automobile accident and hospitalization. Barnes repeated that the contract was "totally prepared and typewritten" and ready for signature, and expressed opposition to the Company's charge of Union bad faith. Further, Barnes contended, because Kelly had referred to an "alleged" agreement, and because of the Company's basic position, there was "little need in wasting the postage sending (the Company) a copy of the Agreement."

In a telegram to the Union's business manager, Tommy L. Williams, on June 6, 1980, Company counsel Weathers-

by requested a meeting to "confer, negotiate, and discuss" the documents mentioned in Barnes' March 12, 1980 letter to Kelly. The telegram requests a copy of the agreement, suggests a meeting with a Federal mediator, mentions three dates the Company would be available, and advises that the Company representative would have authority to execute a contract if in agreement with its terms. Weathersby repeated this request in letters to Williams and Barnes on June 10, 1980.

On June 11, 1980, Barnes replied to Weathersby by telegram attributing delay to the Company, but specifying possible meeting dates in July 1980. Weathersby replied by letter on June 19, 1980, with an agreement to meet on July 3, 1980, one of Barnes' suggested dates. The letter cautions that the Company was not making a commitment to execute a contract it had never reviewed.

Barnes testified at the hearing that he became ill on July 2, 1980, and instructed his secretary to cancel the July 3 meeting. On the same day, July 2, Weathersby sent duplicate telegrams to Barnes and Williams protesting the cancellation. Henson sent a telegram to Weathersby the following day saying that cancellation was necessary because Barnes was the only Union representative who could represent the Company's employees, and Barnes sent a telegram on July 7 attributing the cancellation to illness. Barnes noted that he would be busy the next few weeks on matters including the hearing in the instant case, but promised to get in touch with the Company as to an alternate date. Barnes testified (on July 14, 1980) that he sent the Company a copy of the proposed contract on July 11, 1980, after advising them of his action by telegram the prior day.

## 2. *Analysis and Conclusions*

The General Counsel argues that, although there were differences between the parties through the December 3 meeting, the Union's December 9 telegram accepted the Company's offers on all unresolved issues and constituted acceptance of those offers, thus creating a contract. He also argues that the Company's demand that the Union withdraw charges against the Company, and agree to the discharge of certain strikers for alleged misconduct, constituted insistence upon nonmandatory subjects for bargaining and therefore was violative of Section 8(a) (5). The Company argues that there was no agreement because of numerous unresolved issues despite the Union's telegram, and that therefore there was no contract to execute.

It is clear that there never was any agreement between the parties. All parties concede that there was no agreement prior to the December 3, 1979 meeting between Union Representative Henson and Company Representative Broughton Kelly. At that meeting, Kelly requested Union agreement to Company discipline, possibly discharge, of strikers who had allegedly engaged in misconduct. Barnes' testimony, to the effect that this was not a Company "proposal," is not persuasive. Although the strikers' discharge notices stated that they had been terminated November 15, this had not been implemented. Kelly's testimony shows that he wished to bargain with the Union about discipline of the strikers, and that the Company may have reconsidered the matter and may have contemplated discipline less than discharge. If not, the Company sought Union agreement to the discharges. Henson's stipulated testimony that he would not discuss the firing of strikers suggests that Kelly wished to bargain about the matter and Henson did not. It is

obvious that the Company made a "proposal" at the December 3 negotiating session, involving Union agreement to discipline of strikers, and that the Union refused to discuss the matter.

Nor did the Union intend to accept this proposal in its December 9 telegram. Barnes testified explicitly that that communication was intended only to accept the Company's December 3 offer on departmental organization and progression of jobs, plus the Company's position on all other unresolved issues. Since the telegram was not intended to accept the Company's proposal to discipline strikers, there was no meeting of the minds. This fact makes it unnecessary to consider the myriad of other issues which the Company contends were unresolved.

Inasmuch as there never was any agreement, the Company did not violate Section 8(a)(5) by refusing to execute one. I note in passing that the Union did not deliver a copy of the alleged contract to the Company for signing until months after the supposed agreement.

It is also clear that the Company, by demanding on December 19 that the Union withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts," was thereby insisting on the Union's agreement to a nonmandatory subject of bargaining.<sup>3</sup> At the time of this demand, the Union had already filed a charge and an amended charge, on December 12 and 14, 1979, and thereafter filed additional charges as described above.

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3. *N.L.R.B. v. Local 964, United Brotherhood of Carpenters and Joiners of America*, 447 F.2d 643, 73 LRRM 2167, 2168 (2d Cir., 1971), *enfg.* 181 NLRB 948 (1970); *International Union of Operating Engineers, Local Union No. 12, et al.*, 246 NLRB No. 81 (1979); *Peerless Food Products, Inc.*, 231 NLRB 530 (1977); *Kit Manufacturing Co., Inc.*, 142 NLRB 957, 971 (1963), *enfd.* as mod. 335 F.2d 166, 56 LRRM 2988 (9th Cir., 1964).

There is no evidence that the Company ever receded from this position, set forth on December 19, 1979, and the record shows that this was the last negotiating session. Although there were numerous communications thereafter, neither party changed position—the Union, that it had reached agreement with the Company; and the Company, that any agreement must contain the terms of the Memorandum of Understanding of December 19. I therefore find that the parties reached impasse on the terms of that Memorandum, including the Company's insistence on the Union's withdrawal of any "proceeding or filing." By such insistence, the Company violated Section 8(a) (5) and (1) of the Act.<sup>4</sup>

The General Counsel's contention that the Company similarly violated the Act by insisting that the Union agree to the Company's discharge of certain strikers, presents a more difficult issue. The first question, of course, is whether the discharges were "terms and conditions of employment" within the meaning of Section 8(d) of the Act. It would seem that the most elementary "condition" of employment is the question of whether employment exists in the first place, and that it therefore is a mandatory subject of bargaining. And thus it appeared in an early case where the Supreme Court held that an employer's contract with a company-dominated union forestalled collective bargaining on the discharged employees' rights to present grievances over their discharges to the employer, through their chosen labor organization.<sup>5</sup>

Many cases later, however, distinctions began to appear, and Mr. Justice Stewart stated in a concurring opin-

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4. *Ibid.*

5. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 6 LRRM 674, 680 (1940).

ion in the *Fibreboard* decision:<sup>6</sup> "On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all."<sup>7</sup> His concurring opinion, however, cites various employer practices which have been held to be mandatorily bargainable, and he ultimately agrees with the Court's opinion placing subcontracting in that classification.

As noted previously, the employees' discharge notices were dated November 15, but had not been implemented prior to the December 3 and December 19 negotiating sessions, in which the demand for Union agreement to the discharges or other discipline first arose. However, the Company did not allow the strikers to work on December 10, which, I find hereinafter, constituted disciplinary suspensions on that date, followed by discharge on December 20.

The Board has concluded that an employer's demand for nonreinstatement of illegally discharged employees is a nonmandatory subject of bargaining.<sup>8</sup> The question presented by the instant case is whether the legality or illegality of the discharges determines the legality or illegality of the Company's demand, under Section 8(a) (5), for Union waiver of the employees' employment rights.

In a recent case<sup>9</sup> the Board appears to have answered this question in the affirmative. In that case the union

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6. *Fibreboard Paper Products Co. v. N.L.R.B.*, 379 U.S. 203, 57 LRRM 2609 (1964).

7. *Ibid.*, 57 LRRM at 2616-2617.

8. *Nordstrom, Inc.*, 229 NLRB 601, fn. 3, 609-610 (1977).

9. *Olin Corporation*, 248 NLRB 1137 (1980).

demanding reinstatement of an employee who had been discharged for reasons which were unknown, as a condition of the union's reaching agreement with the employer. Noting that there was no contention that the discharge constituted an unfair labor practice by the employer, the Board stated: "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory within the meaning of the Act. Thus we conclude that the Union's injection of (the employee's) termination into the ongoing bargaining was, in the circumstances, an attempt to frustrate the bargaining process, and we find it to be in violation of Section 8(b)(3)."<sup>10</sup>

This seems to mean that if the discharge had been discriminatorily motivated, the union would have been justified in conditioning agreement with the employer on reinstatement of the employee. A necessary corollary of this position is that an employer similarly does not violate Section 8(a)(5) if he conditions agreement with a union on nonreinstatement of a discharged employee, so long as the discharge was not unlawful. Principles of equity in assessing the relative bargaining obligations of employer and labor organization require this conclusion. As the Board stated, "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory. . . ."<sup>11</sup> The result in *Nordstrom*<sup>12</sup> is not inconsistent with this rationale, because in that case the employees covered by the employer's nonreinstatement demand were unlawfully discharged, and, accordingly, the nonreinstatement demand was also found to be unlawful.

I conclude that disposition of this argument by the General Counsel awaits determination of the Section 8(a)(3) issues.

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10. *Ibid.*, 248 NLRB at 1141.

11. *Ibid.*

12. *Supra*, fn. 8.



B. *The Alleged Independent Violations of Section 8(a) (1)*

1. *Alleged Refusal of Supervisor Rutledge to Permit Union Stewards at Disciplinary Interviews*

The second complaint (paragraph 9) alleges that Company Supervisor Everett Hugh Rutledge,<sup>13</sup> on about February 15, 1980, told employees that they could no longer have Union stewards at disciplinary interviews because the Union no longer existed. The only evidence in support of this allegation is the testimony of employee Alex Favors, Jr., who stated merely that Rutledge "came in with the reprimand" and said that Superintendent Jack Harbin wanted Rutledge "to write me up." Favors testified on direct examination that he asked for a Union steward, that Rutledge replied that there was "no union," and that Favors refused "to sign the reprimand." On cross-examination, Favors stated that Rutledge came in with the reprimand "in his hand." Favors first repeated his earlier testimony that he refused "to sign the reprimand," but, on additional cross-examination, said that he "didn't refuse to sign it."

Rutledge testified that Favors was late on about February 1, 1980, and that he then counseled Favors to try his best to be on time. On the morning of February 15, Rutledge saw Favors in the shop, and the latter said, "I'm late again." Rutledge said nothing, checked Favors' time card and got a reprimand form. He returned to Favors and said, "This is the second time in a two week period. I'm going to have to write you a reprimand." According to Rutledge, Favors replied, "I know I'm in the wrong." Rutledge avers that he then asked Favors whether he wanted "a witness or anyone," and Favors replied that it was not necessary. Favors then signed the reprimand.

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13. The pleadings establish and I find that Rutledge is an agent of the Company and a supervisor within the meaning of Section 2(11) of the Act.



Barbara Lawler, the Company's Manager of Industrial Relations, testified that it was Company practice after the strike, in a disciplinary interview, to afford the employee a representative of his own choosing if he requested one. This was the same policy as the one in effect before the strike. Lawler further averred that there was a meeting of supervisors in December (1979) in which this policy was explained.

### *Analysis of the Evidence*

Rutledge was the more credible witness, and provided a more detailed version of these events. His testimony is supported by that of Lawler. It is clear that Favors had been late a second time, and that Rutledge's determination of this was based on Favors' voluntary statement—to which Rutledge said nothing—and on Rutledge's investigation of Favors' time card. It is also clear that the decision to issue a reprimand was made prior to Rutledge's second conversation with Favors on February 15. Both Rutledge and Favors agree that the supervisor already had the reprimand form in hand when he approached Favors, and that he simply announced that he was going to issue the reprimand. Favors' testimony suggests that the Company decision to issue the reprimand was based on prior instructions to Rutledge from Harbin.

There is a direct conflict in the evidence on the issue of whether Favors asked for Union representation. As already described, Favors changed his testimony on cross-examination and admitted that he did sign the reprimand. Although he may have done so even after demanding a Union representative, this is less plausible than Rutledge's consistent account that Favors volunteered he was again late, admitted that he was wrong, and waived his right to a "witness" when Rutledge offered it. I credit Lawler's

uncontradicted testimony that it was Company policy to grant an employee's request for Union assistance in disciplinary interviews, and that this policy was explained to supervisors in December 1979. It is unlikely that Rutledge would have acted contrary to Company policy, and I credit his testimony on this issue. Further, since Rutledge's alleged "no union" comment was a response to Favors' claimed demand for a steward—which I do not credit—I do not accept Favors' testimony on the "no union" question.

The law on an employee's right to Union representation at a disciplinary interview has undergone recent evolution since the Supreme Court's announcement of that right in the *Weingarten* case.<sup>14</sup> The Board thereafter concluded that "as long as the employer has reached a final, binding decision to impose discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline."<sup>15</sup> This view has also been announced by the Court of Appeals for the Fifth Circuit.<sup>16</sup>

I conclude that this principle is applicable to the reprimand imposed on Favors by Supervisor Rutledge. Although Rutledge obtained his first hint that Favors had been late a second time from the employee himself, there is not a shred of evidence that Favors' disclosure was the result of any Company questioning. Favors simply blurted

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14. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

15. *Baton Rouge Water Works Company*, 246 NLRB No. 161, sl. op. p. 8 (1979); see also *Great Western Coca Cola Bottling Co.*, 251 NLRB No. 122 (1980); *Airco Alloys*, 249 NLRB No. 81 (1980); *K-Mart Corporation*, 242 NLRB No. 140 (1979).

16. *Anchortank, Inc. v. N.L.R.B.*, 618 F.2d 1153, 104 LRRM 2689 (5th Cir., 1980), enf. as mod. 239 NLRB No. 52 (1978).

it out, and Rutledge, without asking any questions, independently determined the truth of the matter by consulting Favors' time card. It is probable that Rutledge reported these matters to Superintendent Harbin, and that the latter made the decision to reprimand Favors on the facts then known. Rutledge's second conversation with Favors on February 15 was therefore solely for the purpose of imposing the discipline upon the latter, and did not constitute a transgression of Weingarten rights.

It is true that the Board has announced a strict construction of this rule. "Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach."<sup>17</sup>

The only one of the foregoing exceptions with any remote application to Favors' reprimand is his action in signing it, apparently at Rutledge's request, after the discipline was imposed. In one sense this may be construed as Rutledge's obtaining a signed "admission" from Favors that he was guilty of the charged offense. On the other hand, it may simply have been the Company's method of obtaining a receipt from Favors acknowledging imposition of the discipline. The written reprimand itself is not in evidence, and the testimonial record is insufficient to warrant an inference that the Company sought or obtained an "admission" in the form of a signed reprimand. If it wanted documentary proof of the infraction, Favors'

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17. *Baton Rouge Water Works Company, supra*, fn. 15.

time card was already available. In any event, Favors waived his right to Union representation, on the credited evidence, and with such waiver rendered the Weingarten doctrine inapplicable.

For these reasons, I conclude that this allegation of the complaint should be dismissed.

2. *Allegation that Maintenance Foreman O'Neal Told Employees There Was Nothing They Could Do About Written Warnings Because There Was No Union and No Contract*

The second complaint (paragraph 10) alleges that Maintenance Foreman Alvin Bruce O'Neal<sup>18</sup> threatened employees on March 14, 1980, that it would be futile for them to engage in Union activities by telling them there was nothing they could do about written warnings because there was no union and no contract. Walter A. Colwell, a striker, testified that he had a conversation with O'Neal after he returned to work. Although Colwell could not remember the exact date, he said that it was about the middle of February 1980 in the "break room." According to his testimony, Colwell told O'Neal that he had been "written up" twice (for overturning a "Caterpillar" and for knocking down an air conditioner), but that only one of the reprimands was warranted. Colwell averred that O'Neal replied that there was nothing he could do because "we don't have a union and we don't have a contract right" (sic). Colwell testified that O'Neal was a friend of his.

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18. The pleadings establish and I find that O'Neal is an agent of the Company and a supervisor within the meaning of Section 2(11) of the Act.

O'Neal testified that Colwell works in "Green End," one of the Company's departments.<sup>19</sup> He acknowledged that he knew Colwell and talked with him regularly, occasionally in the "break room." However, he denied that Colwell ever told him that the latter had been treated unfairly, or that he, himself, said there was no Union contract or no grievance procedure. He testified that he attended several meetings with McCollum after the return of the strikers, and that he was instructed not to harass anybody and to stay within the rules and guidelines of the Company. If anything out of the ordinary came up, he was to inform his superiors.

### *Analysis of the Evidence*

It is odd that Colwell did not complain about his alleged grievance to his own supervisor, Williams. O'Neal was the more believable witness, and I credit his testimony. Accordingly, this allegation should be dismissed.

### *3. Alleged Statements by Plant Manager McCollum that the Company Would Not Sign a Contract with the Union and Would Bypass the Union in Processing Grievances*

The second complaint (paragraphs 11 and 12) alleges that Company Plant Manager Garnett McCollum<sup>20</sup> threatened employees on February 15 and 29, 1980, that the Company would bypass the Union in processing grievances, and, on March 4, 1980, that it would not sign a contract with the Union.

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19. Another witness, Virgil Williams, testified that he is the supervisor of Green End.

20. The pleadings establish and I find that McCollum is an agent of the Company and a supervisor within the meaning of the Act.

Carlene Frost, a striker, testified that she returned to work February 8, 1980, and attended a Company meeting on February 11 or 12. McCollum said that the Company had let them come back to work out of the goodness of its heart. The Company hoped that they would come back without hard feelings, because it wanted them back and did not want any animosity. McCollum was asked about vacations, and replied that he would check into it. He was asked about grievances and reprimands, and replied that "we have no union, no arbitration procedure. Any kind of reprimand that you receive, you bring it to us and we'll handle it."

Mary Burth, another striker who returned at about the same time, testified to a Company meeting on about February 16, 1980. McCollum said that the Company had taken back the strikers "out of good faith." There was no ill feeling between the people that he had taken back (sic). "We still had a union but no grievance proceeding and no steward." Striker Wiley Shepherd remembered a speech in which McCollum said there was "no union."

McCollum testified that he had regular meetings with employees to discuss Company problems. He held two special meetings in February 1980 with employees who had been "terminated" and then offered "reemployment." The purpose of these meetings was to acquaint the employees with some changes in mill operation, and to assure them that they could return with "no strings attached" and no "retribution." McCollum denied saying that they were brought back "out of the goodness of (the Company's) heart." On the subject of grievance procedure, he told the employees that the Company did not have a signed contract or a formal grievance procedure, but that if they had a grievance to bring it to the Company, and McCollum

would "find out the proper channels and how to handle it." McCollum denied saying that there was no longer a union or union stewards at the plant or that the Company would not sign a contract with the Union.

Company Manager of Industrial Relations Barbara Lawler testified that she was present during January 1980 meetings with employees during which she and McCollum spoke to returning strikers.<sup>21</sup> McCollum discussed business conditions, and Lawler discussed a variety of subjects—employee benefits, how to file medical claims, safety, training, etc. Lawler denied that she ever said there was "no union." The Company position, which she stated to the employees, was that there was no contract, but that there was a union. Lawler denied saying that there was no grievance procedure—the issue simply did not come to her attention, according to her testimony.

#### *Analysis of the Evidence*

There is no evidence in support of the complaint allegation that McCollum said that the Company would not sign a contract with the Union. The evidence pertaining to the January 1980 meetings suggests that they were routine in nature, nor does the General Counsel allege anything illegal about them. This aspect of the case thus comes down to the conflicting evidence of the February meetings. Although Frost testified that McCollum said there was "no union," she is contradicted not only by McCollum but also by another striker, Burth. Lawler said that she told employees in the January meetings that the Company's position was that there was a union, but no contract—a simple statement of the true facts. I credit McCollum and Burth, and find that McCollum did not say there was "no union."

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meetings with employees.

21. Lawler was not present during McCollum's February 1980



I also conclude that McCollum did not, as alleged in the complaint, solicit grievances with a promise, express or implied, to bypass the Union in solving the grievances. I credit his testimony that he replied that any employee with a grievance should bring it to the Company, and McCollum would "find out the proper channels and how to handle it." This is not a promise that the Company would remedy the grievance itself, or would bypass the Union. Rather, it constitutes an admission by McCollum that he did not know what to do, but would find out if a grievance were presented to him. The Board has concluded that similar statements, not involving express or implied promises to remedy a grievance, were not violative of the Act,<sup>22</sup> and the same principle is applicable herein.

However, according to McCollum's own testimony, he also told the employees that they did not have a formal grievance procedure. The Company's obligation to its employees extended beyond the complaint theory that it refrain from bypassing the Union in grievance procedure—it was also obligated to refrain from making any unilateral changes in matters which are mandatory subjects of bargaining following expiration of the contract,<sup>23</sup> and was required to process grievances in accordance with the provisions of the expired contract, absent an impasse on that subject.<sup>24</sup>

McCollum was technically accurate in telling the employees that there was no signed agreement, since it had ex-

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22. *Villa Care, Inc.*, 249 NLRB No. 95 (1980); *Marcus Hardware, Inc.*, 243 NLRB No. 158 (1979); *Engineered Apparel, Inc.*, 243 NLRB No. 11 (1979).

23. *Dial Tuxedos, Inc.*, 250 NLRB No. 64 (1980); *Hinson v. N.L.R.B.*, 428 F.2d 133, 73 LRRM 2667, 74 LRRM 2194 (8th Cir., 1970), *enfg.* 175 NLRB 596 (1969).

24. *Turbodyne Corp., Gas Turbine Div.*, 226 NLRB 522 (1976); *Times Herald Printing Co.*, 221 NLRB 225 (1975).



pired. He was inaccurate, however, when he said that there was no formal grievance procedure. That procedure survived the expiration of the contract, and the employees had all the rights thereunder which they had during the life of the agreement. When McCollum told employees that there was no formal grievance procedure, he demeaned their then existing rights under the Act. I conclude that in so doing he interfered with those rights in violation of Section 8(a)(1).

4. *The Interviews With, and Subsequent Discharge of, Willie Bryant:*

The second complaint alleges that Green End Supervisor Virgil Williams<sup>25</sup> denied Willie Bryant's request for Union representation during two disciplinary interviews on February 29, 1980, conducted such interviews nonetheless, and thereafter, on about March 3, 1980, discharged Bryant in violation of Section 8(a)(1) of the Act (paragraphs 13-15, 17).<sup>26</sup> Bryant was an operator of a "timber jack," a large machine which hauls logs, and Williams was supervisor.

Bryant went on strike and returned to work thereafter. On direct examination, Bryant testified initially that he had a conversation with Williams in the latter's office, that the supervisor said he would "drive him to Greenville . . . to get a package." Thereafter, Williams took him to the "jail house" and said the "package" was inside. Instead, Williams requested the sheriff to give an "alcohol

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25. The pleadings establish and I find that Williams is an agent of the Company and a supervisor within the meaning of Section 2(11) of the Act.

26. The second complaint fails to allege the claimed denial of Union representation (paragraph 15) as a violation of Section 8(a)(1) (paragraph 20).

test" to Bryant. Asked on direct examination to repeat this description of these events, Bryant said essentially the same thing, stated that he was given a "breath test," and thereafter was taken by Williams to the office of (Industrial Relations Manager) Barbara Lawler. Williams showed Lawler the results of the test, and Lawler asked Bryant whether he had been drinking. Bryant said "no," although he conceded that he had been drinking the night before, after work. Lawler told him to go home and return on Monday at 2 o'clock. Asked whether there was any further conversation between him and the two Company representatives, Bryant answered in the negative.

Bryant returned Monday and saw Green End Superintendent Jack Harbin, who told him that "they were going to kick (his) damn ass in." Bryant said nothing. Williams came in, took him to another office, and told him he was "terminated." Williams tried to get him to sign something, and Bryant refused. Williams then got Lawler, who also tried to get Bryant to sign something, and he again refused.

After this testimony, Bryant's attention was directed to his initial conversation with Williams, and he was asked whether he had anything to say about the Union. After the Company's objection to the question and an extended colloquy, the witness stated that the "truth" was coming to him. He asked Virgil Williams three times for a "witness", by which he meant a steward, and also asked for one the following Monday during the discharge interview. He did not ask anyone other than Williams for a steward.

On cross-examination, Bryant testified that his actual breath test was lower than the score recorded, "one point," but that Williams asked the policeman to make it "15," or "one point five," and the latter did so. There is no such

statement in Bryant's pre-trial affidavit.<sup>27</sup> Bryant cannot read or write, and the affidavit is signed with his mark. He testified that he told the individual who prepared the affidavit about Williams' telling the police officer what to write down on the report. Bryant denied that he had anything to drink on the day he was examined, or that the police officer said that the test results showed he was highly intoxicated, or that he admitted this to Lawler.

Bryant asserted on cross-examination that both Williams and Lawler told him that he could not have a "witness," and that he asked for one in the first conversation with Williams on February 29, in his subsequent conversation with Lawler on the same day, and in his discharge conversation with Williams on the following Monday. There is no record of the last request in his affidavit.

Williams testified that Bryant had "punched in" on Friday and was "wobbling when he was walking." He told Bryant that he thought he had been drinking, and asked him into the office. Williams then smelled liquor on Bryant's breath. Williams asserts that he asked Bryant whether he wanted a witness, from the Union or otherwise, and the latter replied, "What would it matter?" Williams then asked another supervisor to come in as a witness.

Williams told Bryant that he was under suspicion of drinking, that it would be to Bryant's advantage to have a test, and that the latter agreed to do so. Williams denied telling Bryant that he wanted him to accompany the former "to pick up a package." Williams took Bryant to the sheriff's office where Bryant's breath was analyzed.

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27. After the Company used the affidavit in an attempt to impeach Bryant, it was admitted into evidence on the General Counsel's motion, over the Company's opposition.

The test result was ".15", which, according to the officer's statement to Williams, normally meant that the individual was "drunk."

Joseph C. Branch, Deputy Sheriff of Meriweather County, Georgia, testified that he has received special training in the administration of "Breathalyzer" or "Intoximeter" tests, and has administered hundreds of such tests. Williams brought Bryant in on February 29, 1980, and requested a test. Branch told Bryant that he did not have to take the test and that there was nothing Branch could do if Bryant refused. Bryant then said he would take the test. The result, according to Branch, was ".15 grams percent." The report of the test is in evidence. Further, according to Branch, under Georgia law a driver with a test result of .10 grams percent can be charged with "driving under the influence." Branch denied that Williams asked him to alter the test result.

Williams testified that he took Bryant to Lawler's office after the test, that the latter again asked Bryant whether he wanted a representative, and that Bryant refused. Lawler could not recall whether she asked Bryant whether he wanted a Union representative, but was positive that Bryant himself did not ask for one.

Williams gave Lawler the copy of the Breathalyzer test, and the latter asked Bryant what he had been drinking. According to Lawler, Bryant replied that he had "about half-a-pint of Seagram's about noon time." Lawler informed Bryant that he was suspended, and instructed him to return the following Monday, March 3, 1980. Lawler then called the sheriff's office and received information about the test results substantially the same as those stated by Deputy Sheriff Branch.

Bryant arrived early on March 3, according to Lawler. She told him that Williams would be talking with him,

and asked him whether he wanted a representative. Williams then took Bryant into a conference room for the purpose of terminating him. Williams testified that Bryant did not ask for a Union representative. Williams discharged him, and Bryant refused to sign the "release papers." Williams then came to Lawler's office and said that Bryant wanted to talk to her. She went to the conference room, where Bryant, who was "upset," said that he was "going to get the Union on this."

### *Analysis of the Evidence*

I credit Deputy Sheriff Branch's impartial testimony and the documentary evidence of his testing of Bryant. Based on the scientific evidence, I conclude that Bryant was intoxicated on February 29, 1980. The Company argues, from this fact, that Bryant is the least reliable witness of the events of that day. There is merit in this argument.

Other aspects of Bryant's testimony cast doubt on his accuracy and truthfulness. Thus, the Breathalyzer test result, plus Lawler's testimony that Bryant admitted drinking half-a-pint of whiskey at noon that day, impugn Bryant's testimony that he had not been drinking. Bryant's statement that Sheriff Branch altered the test results at Williams' request is unsupportable, since Branch, an unquestionably credible witness, denied this accusation. Bryant's testimony about the "package" that Williams supposedly wanted to get is improbable, and I credit Williams' denial.

On the crucial issue of whether Bryant requested Union representation,<sup>28</sup> the fact that he repeatedly failed

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28. It is clear that the Company had already decided on the discipline to be imposed prior to the interview with Bryant on March 3. Accordingly, the only relevant issue is the alleged denial of Union representation on February 29, 1980. See authority cited in fn. 15, *supra*.

to mention this on direct examination, until asked a leading question, casts doubt on his later testimony. This doubt broadens into disbelief when Bryant's testimony is compared with the clear and explicit testimony to the contrary from Lawler and Williams. Although Bryant's pre-trial affidavit tends to support his corrected testimony, there are discrepancies between the affidavit and the testimony. I credit Lawler and Williams and conclude that Bryant did not in fact ask for Union representation at any time, that he was in fact offered same at the times specified in the Company representatives' testimony, and that he declined. The fact that he demanded Union participation after the interviews and after he had already been discharged, as stated by Lawler, is irrelevant to the issue of whether he was denied his rights under *Weingarten*.<sup>29</sup> It is also clear that Bryant's participation in the Breathalyzer test was entirely voluntary on his part.

I have carefully considered the fact that Bryant is illiterate. Although he sometimes has difficulty in expressing himself clearly, he is sufficiently alert to know his rights.

Whether Bryant was not sufficiently alert to comprehend these rights on February 29, 1980, because of his intoxication, raises a different issue. Is an employer precluded from investigating suspected employee intoxication because the employee does not understand his *Weingarten* rights? If this were law, an employee could repeatedly drink himself into a stupor on the job, or accomplish the same result with narcotics, and then protest his subsequent discharge on the ground that he did not understand his rights when the employer investigated the matter—in effect protecting himself with his own transgression.

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29. *N.L.R.B. v. J. Weingarten, Inc.*, *supra*, fn. 14.

In the careful balancing of employer and employee rights which is mandated by the Act, a license of this nature would preclude an employer from requiring sobriety among his employees. This is unreasonable, and I do not believe that *Weingarten* extends this far.

For the foregoing reasons, the allegations pertaining to Willie Bryant should be dismissed.

5. *Remaining Independent Section 8(a)(1) Allegations*

There being no evidence in support of the remaining Section 8(a)(1) allegations, they should be dismissed.

C. *Alleged Violations of Section 8(a)(3)*

1. *Introduction*

As described above, the strike began on November 15, 1979. The comparative numbers of strikers, nonstrikers, and alleged discriminatees are not clear from the record. In a complaint filed in a Georgia state court, described hereinafter, the Company stated that there were 200 employees in the plant. Plant Manager McCollum testified that he saw 140 pickets on the first day of the strike, while Industrial Relations Manager Barbara Lawler mentioned 60 as the most that she saw. Inasmuch as there are 28 employees alleged to have been discriminatorily discharged (in the first complaint), it is reasonable to infer, and I find, that there were at least twice as many strikers as alleged discriminatees.

After the Union's telegram of December 9, 1979, advising the Company that the Union was accepting the "last Company offer" (of December 3), and that employees would return to work on December 10, numbers of strikers reported for work. Some of these were put back to work



immediately, although not necessarily on the same shift which they occupied before the strike. The first shift had been filled by permanent replacements, except for one job, and returning strikers were hired on the second shift on the basis of seniority and first in time to report to work. There was no third shift in December 1979.

Of the strikers who attempted to return, 28 (named in the first complaint) were not put back to work at that time. Separation notices of 25 strikers dated November 15 stated that they had been terminated for various alleged acts of misconduct. According to Industrial Relations Manager Lawler, however, the separations were not effectuated until December 20, the day after the last bargaining session. It is clear nonetheless that the alleged discriminatees were not returned to work on December 10.

After the issuance of the first complaint (February 4, 1980), the Company offered all alleged discriminatees "positions of employment and reinstatement." It began a third shift, and the returning alleged discriminatees were returned to work on that shift, since the first and second shifts were filled. These employees gained no time for seniority and vacations until they reported for work in February 1980. Industrial Relations Manager Lawler credibly testified that third shift employees receive 15¢ more per hour than employees on other shifts doing the same work, that first and second shift vacancies existed after February 1980, and that there were third shift employees who did not bid for these vacancies although they were permitted to do so under plant rules.

The first complaint alleges that all 28 of the employees named therein were discriminatorily discharged because of their Union activities, and the second complaint alleges



that 2 of these employees were also denied accrued vacation leave for the same reason.

The General Counsel's position at hearing was that the fact that the 28 discharged employees were strikers establishes a *prima facie* case of discriminatory motivation. In his brief the General Counsel appears to argue that the delay in time between the decision to fire certain strikers and the actual implementation of the discharges further establishes unlawful motive. The General Counsel further argues that the return of the 28 strikers to employment with the Company in February 1980 does not constitute "reinstatement."

The Company responds that the General Counsel has not established a *prima facie* case of discrimination, and points to the fact that it did take back some strikers on the day the strike ended. The Company acknowledges that, in past cases of discharge after extended absence, the notification of discharge was sent by mail, but contends herein that there was an inevitable delay because of the disruption of the strike, the strikers' unavailability during the strike, and the fact that Company policy on discharges required consultation among various supervisors before a decision could be made.

Of the 28 strikers that it did not take back until February 1980, the Company contends that 25 were discharged because of strike misconduct. Two were discharged because they refused different jobs at lesser pay which the Company offered them in lieu of their former jobs, which had been filled by permanent replacements. Even if these latter two discharges were "inappropriate," the Company further argues, the two employees have already received the maximum remedy allowable under Board law—placement on a preferential hiring list as

economic strikers, and reemployment as soon as jobs became available. One striker, a probationary employee according to the Company, was discharged for alleged absenteeism.

The Company also alleges various events which compelled it to take protective and legal action. Thus, it contends that it suffered unusual property damage and suspected "sabotage" during the strike. Plant Manager McCollum stated that the blades of a "chipper"—a machine which converts pieces of wood into chips—were destroyed by a bullet which was found in the machine. A "gear box" was damaged because a "worm gear" was installed backwards. (Striker James Kelly, a maintenance expert, said this was impossible.)

Wires to a pump which controlled water to the boiler were cut, according to McCollum, which could have resulted in serious damage if the boiler exploded. Security Guard Richard Brown stated that he had a conversation at his father's house with striker Scott Fowler, who said that the boiler would not run when they tried to start it up. No water could get to the boiler when attempts were made to start it, and an investigation in which Brown participated determined that the wires were cut. (Fowler admitted a conversation with Brown at his father's house, but could not recall any discussion about the boiler.)

McCollum asserted that, after the strike began, nails and crates were found in the driveway, rocks were thrown, shots were fired in the plant, and there was mass picketing preventing access to the plant. After the cutting of the wires to the boiler pump, the Company hired a security dog service.

The Company also sought and obtained from a Georgia state court an injunction restraining the Union and in-

dividual strikers from engaging in various activities including damage to Company property, and sundry other alleged threats and intimidation.

The injunction also regulated the Union's conduct of picketing. Thus, the Union and individual strikers were enjoined *inter alia* from maintaining more than four pickets at any one time at an entrance to the Company's property, and from blocking or interfering with ingress and egress from Company property.

Following is a discussion of the factual issues in individual cases, including the evidence of alleged employee misconduct.

2. *The Discharges Alleged by the Company to Have Been Decided Upon Prior to the Strike*

(a) *James Kelly*

Kelly was the chief Union steward at the time of the strike. His separation notice states that he was terminated because he told the plant manager (McCollum) on the day of the strike (November 15, 1979) that he had "engaged union people in an organized plant slow down," allegedly in violation of the labor agreement.

McCollum testified to a conversation with Kelly a few minutes before the strike began, in which both McCollum and Kelly expressed regret that matters had come to a strike. Kelly said, according to McCollum, "We did not have anything to do with the chipper incident. . . . The only area that we had planned to slow down during this was the Green End department. We didn't have to do anything to it, because Maintenance took care of it."

Kelly testified that he told McCollum, "We had plans, but did not have to implement them, to slow down the

place because of the mechanical breakdowns . . . ." Kelly averred that these were the plans only of a few Union members, but that the official Union policy was to increase production because the lumber was becoming damaged by rain.

Green End Superintendent Jack Harbin said that he received a report that Kelly was causing general disruption in the plant a few days before the strike. McCollum and Harbin also testified that Kelly, a maintenance mechanic, was assigned to repair the trimmer, but took an unusually long time to do so. Kelly said that this was true, and that the reason was a faulty "printed circuit," normally not defective.

McCollum reported the conversation about the slowdown to Broughton R. Kelly, Director of Industrial Relations, and the decision to discharge James Kelly was made that day. According to the Company, Kelly was not notified immediately for the reasons given above.

### *Analysis of the Evidence*

Although there is some ambiguity in the meaning of Kelly's slowdown statements attributed to him by McCollum, crediting Kelly, I find that he told McCollum that a slowdown had been planned but had not been implemented because of mechanical breakdowns. I attach little weight to Harbin's testimony about "general disruption" caused by Kelly because of its vagueness.

Accordingly, although the Company has established that Kelly told McCollum that a slowdown was "planned," the General Counsel has established that Kelly did not, as alleged in his separation notice, tell McCollum that he "engaged" in a slowdown with other employees.

(b) *Joseph M. Williams*<sup>30</sup>

Williams' termination notice states that he was discharged because of vulgar language "directed to" his supervisors just before the strike, and abusive, obscene language "to" nonstriking personnel during the strike.

Supervisor Rutledge testified that Williams was assigned the task of sweeping just before the strike started on November 15. As Karen Eley, a nonstriking employee, was entering the plant, Williams said in colloquial language that he would like to engage in sexual intercourse with her. Williams also asked, according to Rutledge, "I wonder who is going to keep these sons-of-bitches from getting their asses whipped." In response to inquiries from other employees, Williams said that he meant the supervisors.

James L. Coone, a supervisor at the time, testified to sexual remarks by Williams to Eley and also to Barbara Lawler. Also, according to Coone, Williams called out to McCollum, "Come on down here, I'll whop your ass," and, "You better get somebody to follow you home this evening." Green End Superintendent Jack Harbin gave similar testimony.

Lawler herself described vulgar language from another employee, on another occasion, but said nothing about Williams. Eley did not testify. Her affidavit is in evidence, but does not mention Williams. McCollum said only that Williams was discharged for "immoral and indecent conduct, insubordination, and an uncivil attitude towards his supervisor." On cross-examination, McCollum did not know the name of the supervisor to whom Williams was allegedly insubordinate, and said that Williams was not insubordinate to McCollum himself. Further, according

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30. Williams is referred to in the first complaint and the transcript as "Mike" Williams.

to McCollum, no female employees reported indecent remarks made to them by Williams, although a male supervisor had reported such language.

Rutledge also testified that he was leaving the plant with Harbin early one morning during the strike and that Williams and others were sitting in front of the guard shack used by the pickets. Harbin told the pickets that they were "not obeying the restraining order of walking the picket line." Williams said, "Damn it, if that's the way you feel about it," picked up a rifle leaning against the shack, and held it in the port position. Harbin testified that he told Williams he was not picketing properly, but did not actually see Williams pick up a rifle.

Williams denied all the statements attributed to him with respect to Lawler and Eley, and denied seeing either of them on the morning the strike began. He denied seeing McCollum on that occasion or making any statements to him. Williams acknowledged seeing McCollum and Harbin leaving the plant early one morning when Williams was standing near a "hut." Harbin asked whether Williams and other employees with him had seen the restraining order. Williams said that he had not, and Harbin said that they were going "to get the law" if Williams and the other employees weren't on the picket line in so many seconds. Williams replied, "If that's the way you feel, go get it." However, he denied reaching for a gun or any other object.

#### *Analysis of the Evidence*

It is significant that neither McCollum, Lawler nor Eley—allegedly objects of verbal abuse from Williams—made any firsthand complaint about him. The fact that McCollum believed the "insubordination" remarks to have been made to another supervisor supports Williams' denial

that he even saw McCollum. I do not credit Coone's testimony about statements allegedly made directly by Williams to McCollum, or obscene remarks allegedly made directly to Lawler or Eley. Accordingly, the specific allegation in Williams' separation notice has not been established. However, I credit the evidence to the effect that Williams spoke to other employees about supervisors getting "their asses whipped," and made the alleged sexual statements about Lawler and Eley heard by other employees.

Williams' testimony about the early morning incident outside the plant is more explicit than Rutledge's, and I credit Williams' version. Because it was dark at the time, Rutledge could easily have been mistaken about Williams picking up a gun, and I credit the latter's denial. As noted, Harbin did not see a gun. The credited evidence thus shows that Harbin told Williams that they were going to get the law on him if he did not start picketing (or picketing properly), and Williams told him to go and get it (the law). However, this incident is not alleged in Williams' separation notice as a reason for discharge.

In sum, the Company has established that Williams made remarks about female employees and supervisors to other employees, but the General Counsel has established that these remarks were not made directly to the female employees and supervisors as alleged in the separation notice.

(c) *Terri Bowden Fuller*<sup>31</sup>

Fuller was a probationary employee hired on September 10, 1979, and was discharged on December 11, 1979—because of Union activity according to the General Counsel, and because of excessive absenteeism according to the

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31. Fuller is referred to as Bowden in portions of the record.



Company. The Company's "Report of Exit" states that she was absent on three occasions, and late on another in "48 scheduled work days." The notice also states that Fuller was told she was terminated because she was not dependable. The parties stipulated that there were no warning notices or formal reprimands in her personnel file prior to termination.

Fuller testified that she was hired with a 45-day probationary period, and that her supervisor, Thomas Haynes, spoke to her once about being out of work. "I was out two days that time," she testified. Fuller stated that she had a virus and a doctor's excuse. Haynes made no response to that, said she was a good worker, and he would like to keep her, but did mention her absenteeism. Another supervisor, Hogan, gave her a book on "grading" and told her to study it.

Fuller testified that she went out on strike, carried a picket sign, and was seen by Industrial Relations Manager Barbara Lawler and by employee Margaret Gregory. When Fuller returned after the strike, she was told by Haynes that she was being discharged because of excessive absenteeism.

Lawler testified that she herself crossed the picket line frequently during the strike, but never saw Fuller. Fuller was absent three or four times and late once, and was therefore terminated as a probationary employee. There are no strict rules for assessment of probationary employees, according to Lawler. The Company submitted termination papers of other such employees discharged for similar reasons.

Lawler confirmed Fuller's testimony that the probationary period is 45 work days. Probationary employees are normally discharged by the supervisor, after consulta-



tion with Lawler, near the end of the probationary period. Fuller was near the end of her probationary period when she was terminated, but not over it, despite the 48-day reference on her exit report, according to Lawler. Although 48 days were "scheduled," the absences brought the days "worked" down to 45 or less. Fuller was not notified until she returned from the strike because there was no opportunity until then for the customary discussion between her and her supervisor.

Margaret Gregory testified that she worked at the plant during the strike, crossed the picket line every day, and never saw Fuller. Plant Manager McCollum said that he never saw her. Finishing Superintendent Larry Hogan stated that Fuller was a good employee and that he gave her a book to study in the belief that she might become a grader. However, she was fired because of absenteeism.

Charles K. Prather, a striker, testified that he returned to work after the strike as the Union's chief steward. (As indicated, former chief steward James Kelly was discharged.) In December 1979, Prather attempted to engage in a "discussion" with McCollum concerning Fuller, arguing that Fuller had not been absent as many times as alleged. According to Prather, McCollum replied that there was no formal contract and therefore no grievance procedure, and that Fuller was a probationary employee.

McCollum acknowledged a conversation with Prather about Fuller, and denied ever telling Prather that there was "no union present." However, he did not contradict Prather's testimony that the latter attempted to present a grievance concerning Fuller, and that he, McCollum, said there was no grievance procedure.

Article 4 of the labor agreement, which expired November 15, provides in relevant part: "All new employees

shall be considered as being probationary employees during the first forty-five (45) days worked. The Company shall have the right to terminate or lay off probationary employees and such terminations or layoffs shall not be subject to the grievance procedure or to arbitration."

Article 9, section 1, describes a "grievance" as a claim that the Company has violated the Agreement. "Grievances shall be limited to the interpretation and application of the terms in this Agreement. If the Company feels that a grievance is not valid or arbitrable, it will proceed to answer and process the grievance in accordance with all terms of this Article, but this will not waive the Company's right to challenge the validity or arbitrability of the grievance."

Article 9, section 2, provides that all grievances shall be handled "exclusively" in the manner set forth in the Article. Step 1 allows the employee "a reasonable period of time to present the grievance to the supervisor on his regular shift." In the event the grievance is not resolved, Step 2 allows the employee five days after the supervisor's decision to appeal the decision in writing to the plant manager, citing the provision of the labor agreement alleged to have been violated. Other provisions specify a third step, and arbitration.

#### *Analysis of the Evidence*

Disposition of the complaint allegation concerning Fuller requires a determination as to whether she was a probationary or regular employee at the time of her discharge. She remained a probationary employee under the labor agreement through her 45th day of work. Her exit report shows that 48 days were "scheduled," and Lawler testified that Fuller was absent three or four times and late once. If Fuller was absent three times, she

could not have worked more than 45 days, and would have remained a probationary employee. Fuller's supervisor spoke to her about her absenteeism, and Fuller herself acknowledged being absent two days "that time," suggesting that there were other times. I credit Lawler's testimony on Fuller's absences and find that she was a probationary employee at the time of her discharge.

I also accept Lawler's testimony on the practice of having probationary employees discharged only after a discussion with their supervisor, and conclude that this was the reason Fuller was not discharged until the day after the strike ended.

I credit Fuller's testimony that she was on the picket line, and the testimony of the Company supervisors that they did not see her. This is not inconsistent testimony.

I also credit Prather's testimony that he returned after the strike as chief steward and, in a discussion with McCollum, attempted to present the Fuller discharge as a grievance. I also credit Prather that McCollum replied that there was no formal contract and therefore no grievance procedure. McCollum's denial that he said there was "no union present" does not meet Prather's testimony. I therefore find that the Union attempted to present an oral grievance on the Fuller discharge to Plant Manager McCollum, and that the latter refused to process it, saying there was no formal grievance procedure. However, since Fuller was a probationary employee, her termination was not subject to the grievance procedure. I also find that the grievance was not presented in the manner required by the expired contract in that it was not first presented to Fuller's supervisor, Haynes, as required by Step 1, and thereafter in writing to McCollum.

I conclude that the Company has established its stated reason for Fuller's discharge as a probationary employee.

### 3. *Alleged Employee Misconduct During the Strike*

#### (a) *Scott Fowler—The Gun Incident*

Fowler's separation notice states that he was terminated because he attempted to shoot out plant lights with a slingshot, and pointed a gun in the direction of the plant manager.

Plant Manager McCollum testified that, on the first Monday following the date that the strike began (November 15), there was considerable excitement as nonstriking employees came to work through the picket line. McCollum stated that a truck driver reported to him that an individual was standing on a county road which runs alongside the plant.

McCollum looked through binoculars he was carrying and said that he recognized Scott Fowler. Fowler made a clenched fist, went back to a car and got a gun and pointed it at McCollum. The latter asserted that he was terrified, sought cover, and observed Fowler again from another location. McCollum called the sheriff and reported the matter about 30 minutes later to Union Representative Barnes, who told him that there was no bolt in the gun. Dean Clay, a Company security officer, testified that he saw Fowler pointing a rifle with a scope on it at the mill, with the police arriving a few minutes later. Larry Hardwicke, a Company employee, testified that he drove past Fowler on the road and saw him looking through a rifle scope which was pointed at persons in the mill area.

Union Representative Barnes testified that McCollum complained about an employee on a hill with a gun. Barnes went and investigated, and discovered Fowler with a rifle scope looking down toward the plant. Barnes told Fowler not to have a gun up there, and Fowler replied that he had not taken his gun out, merely the

scope. He added that the clip and bolt were not in the gun. Barnes returned to the plant and told this to McCollum.

Fowler testified that he drove along the county road, parked, got out of the car, and saw some people at the plant watching him through binoculars. The record contains a variety of estimates and a diagram concerning Fowler's distance from the plant. Whatever the actual distance, it is apparent that it was close enough for Fowler to see that others were watching him.

Fowler testified initially that he had been out deer hunting and had a rifle. He took it out of the car, removed the scope, put the rifle on the trunk of the car, and looked at the plant through the scope while leaning over the car. The bolt was not in the rifle. The witness later testified that he re-attached the scope to the rifle, in a manner whereby he pointed the rifle at a plant log yard. However, Fowler also said that he may have pointed the rifle "over the plant" while holding it to his shoulder in a firing position. A deputy sheriff came by, asked what he was going, and kept going. Someone else told him that he had better leave, because he had "scared everybody to death."

#### *Analysis of the Evidence*

Fowler was an equivocal and unreliable witness. I credit Barnes' testimony that Fowler told the Union representative that he had not taken the gun out of his car—a statement clearly contradicted by Fowler's own testimony. Fowler's pre-trial affidavit, which is in evidence, contains other contradictions. I credit McCollum's uncontradicted testimony that Fowler first clenched his fist at McCollum, and McCollum's later testimony that Fowler then got a gun from his car and pointed it at McCollum.

McCollum's testimony is corroborated by Clay and Hardwicke, partially corroborated by Barnes, and partially admitted by Fowler. From the fact that Fowler could admittedly see people looking at him before using his scope, and the fact that he clenched his fist at McCollum, I infer that his action was intended to be a threatening gesture.

I conclude that Fowler in fact pointed a gun in McCollum's direction as alleged in his separation notice.

(b) *Kenneth V. Palmer—Alleged Picket Line Threats of Violence*

Palmer's separation notice states that he was discharged for attempting to damage Company property with a slingshot, and for threatening an employee attempting to cross the picket line. At trial, the Company also contended that Palmer picketed with an axe in hand.

Plant Manager McCollum testified that the manager of the security dog service gave a demonstration involving a dog "attacking" a man, which took place about 10 to 15 feet from the picket line. After the demonstration began, Palmer picked up an axe which the pickets used for chopping wood, but McCollum did not see him carrying it on other occasions. Lawler testified that she saw Palmer with a picket sign and an axe, but could not recall seeing dogs in the vicinity.

Green End Superintendent Harbin testified that he saw Palmer driving recklessly near groups of strikers on the road. A "strike log" maintained by Lawler notes that "Harold Whitney" saw Palmer handling a gun in the back of his car, and "threatening them w/ax."

John W. Todd, a Company employee, testified that a supervisor called Todd after the strike began and asked

him whether he desired assistance in coming to work. When Todd replied in the affirmative, the supervisor led Todd up to the gate, each driving his own vehicle. Two strikers walked in front of Todd's vehicle as he approached the gate and he stopped. One employee asked Todd whether he was going in and, when Todd replied in the affirmative, the other said that it would be "mighty bad" for him to do so. The other employees stepped aside, and Palmer asked, "You say you're going to work?" When Todd again replied affirmatively, Palmer said that he would see him in the pool room. Palmer attempted to approach Todd's truck, but other employees held him back. Todd could tell that Palmer "wasn't joking," and therefore did not go into work.

The Company strike log contains a November 20 note that Palmer "threatened" a truck driver attempting to make a delivery into the plant, but the driver nevertheless entered.

### *Analysis of the Evidence*

This evidence is insufficient to establish any misconduct on Palmer's part. His carrying the axe on the picket line may have been caused by fear of the dogs. In any event, it did not involve any threat to another employee, and was not alleged in his separation notice. Although Lawler could not see any dogs, they were clearly on the premises, and according to McCollum a demonstration was held a few feet from the picket line.

Palmer's words reported by Todd are too innocuous to constitute a threat, no matter how Todd interpreted them or Palmer's asserted attempt to get to Todd's truck. The "strike log" notes are too vague, and lack the probative force of live testimony, to constitute evidence of



misconduct. It is unlikely that Palmer would have been endangering the lives of his fellow strikers, as Harbin charges, and this was not alleged in the separation notice. Although Palmer did not testify, I see no reason to draw an adverse inference from this fact absent a *prima facie* case of misconduct.

I conclude that the Company has not established the threat to another employee alleged in Palmer's separation notice.

(c) *Phillip J. Faulkner/Scott Fowler/Kenneth V. Palmer—The Slingshot Incident*

Faulkner's separation notice, like that of Palmer, alleges an attempt to damage Company property with a slingshot.

Company Security Officer Dean Clay testified that, about a week and a half after the strike began, he saw Faulkner, Fowler, and Palmer using a slingshot to shoot at a light over a rail spur near or on Company property. He also saw broken glass under the light, but the light was not broken. This testimony was corroborated by Security Officer Wally Steed, although the witness identified only Fowler and Palmer with certainty. Steed said that the slingshot used steel pellets, and was of a kind used for game hunting. McCollum said that the light "appeared" to be broken, but he did not see any glass.

Fowler testified that Faulkner, Palmer, and he took turns shooting at a bird on a rail car on the spur, which is on Company property. They did not shoot at or damage the light, and Fowler informed Supervisor O'Neal of this fact when he returned to work. O'Neal did not testify about this incident.



### *Analysis of the Evidence*

It is clear that the three employees were firing at something on Company property with a slingshot. I find that they were in fact firing at a bird rather than a Company light, and did not damage the light.

Although Faulkner's and Palmer's separation notices allege an attempt to damage Company "property," rather than lights as in Fowler's notice, I interpret the former two notices to mean the same thing as Fowler's notice, in light of the Company's position at hearing. Although the Company argued that the railroad boxcar itself may have been damaged, I conclude that this is a trivial argument, and that the General Counsel has established that the above-named three employees did not engage in the actions alleged.

#### *(d) Michael W. Buttram—Nails on Plant Entrance Way*

Buttram's separation notice states that he was discharged in part for his presence on the picket line when large nails were discovered at the entrance. Broughton Kelly testified that Buttram was present at times when the nails were there, but said that he did not know who distributed the nails. This is clearly insufficient to charge Buttram with any offense, nor is it sufficient to establish that the Company had an honest belief of same.

#### *(e) Landis Bishop/Jeffrey A. Hughes—Visting Home of Nonstriking Employee and Threatening Him*

The separation notices state that the above-named employees visited the home of a nonstriking employee and threatened his family and property.

William A. Walker testified that he did not go on strike, that Bishop and Hughes visited him at his home, and that a conversation took place. The evidence indicates that the two employees stood outside an opened glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker said that Bishop and Hughes were drunk, cursed, and said that he was "screwing them out of their . . . damn money" by working during the strike. Bishop said that he would "take care of" Walker if he returned to work—a statement repeated by Hughes. Walker asked them to leave early in the conversation, but they took their time doing so.

Bishop said that he had been a Union steward, and that Walker was a probationary employee who had asked Bishop when he could become a Union member. He went to Walker's house to find out why he had returned to work. According to Bishop, Hughes had had only "one half of one beer," and the only improper language was the word "damn." Hughes said that Walker was "messing with a lot of other people's money." Walker asked whether they had come to threaten him, and Bishop denied it. However, Bishop stated that he told Walker that if he went back to work, he might be doing it at his own risk. Although neither Bishop nor Hughes would hurt him, other people might do so, according to Bishop.

I credit Walker's version of this incident, and find that the Company has established that Landis and Hughes threatened Walker with bodily injury.

- (f) *Michael Buttram/Robert Barry McCoy/Anthony Crouch/Mary Burth/James O'Neal/Eulice Favors/Yvonne Blalock/Charles Brown/John Ward/Cecil C. Barber/Carlene Frost—Alleged Mass Picketing and Blocking Access to Plant*

The separation notices of the above-indicated employees state that they engaged in mass or illegal picketing and/or engaged in blocking access of vehicles to the plant.

Margaret N. Gregory, a Company employee, testified that she saw the above-named strikers, except O'Neal, picketing when a yellow station wagon turned into the plant. The witness alternately testified that the pickets were standing "around" the vehicle, and "alongside" it. They spoke to the driver and the car then left. Gregory did not know the identity of the occupants, who may have been strikers, according to her testimony. Gregory also saw a blue and white Mack truck loaded with logs, which was stopped by the same employees, and left. About 125 vehicles entered and left the plant daily, and these were the only two instances where vehicles were stopped, according to the witness.

Barlow testified he was at the plant entrance with 10 to 12 other employees when a truck loaded with logs approached. Barlow, who was standing at the side of the road, put up his hand and the truck stopped. The driver asked "what was going on"; Barlow replied that they were on strike and asked the driver to honor the picket line. Although there were other employees on the other side of the road, there were none in front of the truck. The truck turned around and left. Barlow's testimony was corroborated by Carlene Frost and Mary Burth, who were on the other side of the truck.

Mary Burth also testified that the same employees, plus O'Neal, were at the plant entrance when a brown station wagon approached on the county road leading to the driveway to the plant. Barlow raised his hand from the side of the road, and a woman driving the station wagon said she was looking for a logging contractor. The employees said that they were on strike and would appreciate it if the driver did not cross the picket line. There was no line of employees in front of the station wagon, according to Burth. There were only four employees with picket signs, with two at a time walking past one another in front of the plant entrance.

#### *Analysis of the Evidence*

I credit the testimony of Barlow, Frost and Burth on the log truck incident. Gregory was some distance away, and her testimony that the strikers "stopped" the truck is vague in comparison to the explicit descriptions of the strikers. I also credit Burth's testimony on the station wagon incident. Gregory's testimony is internally contradictory as to what the strikers did. These two incidents, out of 125 vehicles entering and leaving the plant daily, are insufficient to prove "blocking" of access to the plant. Nor do they establish "mass picketing" or violation of the state court injunction. There is no evidence that the Company has ever made such contention in the Court.

I find that the General Counsel has established that the above-named employees did not engage in the above-described actions alleged in their separation notices.

#### *(g) Preston D. Barlow—Abusive Language to Supervisor*

Barlow's termination notice states that he was discharged for abusive language on the picket line towards supervisors.

Industrial Relations Manager Lawler testified that, as she was crossing the picket line on the way to work one day, she heard Barlow refer to her as "that f----- bitch," and "that mother f-----, that ugly bitch." According to Lawler, Barlow referred to her as a "bitch" on another occasion. Barlow testified that he had a picket line conversation with Lawler, but could not remember, or did not think, that he made any such remarks.

Lawler was a more reliable witness. I credit her testimony, and find that the Company has established the conduct attributed to Barlow in his separation notice.

(h) *Crosby Favors—Throwing Rock at Supervisor's Car*

Favors' termination notice states that he was discharged for throwing a rock at a supervisor's car. Supervisor Virgil Williams testified that Favors threw a rock which hit Williams' car as the latter was leaving the plant. Williams' testimony is corroborated by that of Harbin. Favors did not testify. I credit the uncontradicted testimony of Williams and Harbin, and find that the Company has established the conduct attributed to Favors.

(i) *Steven Smith—Picketing with Motorcycle Chain*

Smith's termination notice states that he was discharged for improper picketing. Broughton R. Kelly testified without contradiction that he saw Smith picketing with a motorcycle chain in his hands. He also testified that Smith told him that he was afraid of the security dogs. I credit Kelly's testimony, and note that there is no evidence that Smith threatened anyone with the motorcycle chain. From this I infer that it was intended as defense against the dogs. I conclude that Smith did not engage in improper picketing as alleged in his separation notice.

(j) Crosby Favors/Jerry Kirbo/Robert L. Russell  
—Threats to Job Applicant

The separation notices of Kirbo and Russell charge them with threatening a job applicant.<sup>32</sup> The only evidence of the alleged misconduct consists of an affidavit of Reeves.<sup>33</sup> The latter asserts that he went to the plant on December 11 intending to apply for employment. Before he went in, Russell said to him that he had a better job at another plant, and that he would be the first one fired after the strike was over. Favors said that he would not be responsible if something happened. When Reeves said that he had five children, Favors said that something might happen to one of them. After Reeves had been interviewed, and as he was leaving, Kirbo said, "Say, nigger, did you get the job?"

Neither Favors, Kirbo nor Russell testified. Inasmuch as the General Counsel declined opportunity to rebut the statements in Reeves' affidavit, and because of its inherent reliability, I credit Reeves' statements made therein.

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32. Favors' separation notice does not contain any such allegation.

33. The Company served a subpoena upon Reeves, but the latter did not appear at the hearing. The Company then sought to introduce Reeves' affidavit, relying on Rules 804(a)(4) and (b)(5) of the Federal Rules of Evidence. Ruling was reserved, and the General Counsel was afforded an opportunity to introduce evidence rebutting the affidavit. He declined to do so, except for a stipulation, agreed to by the Company, that Favors "is a member of the Negro race."

The affidavit is not admissible under Rule 804(a)(4) since there is no evidence that Reeves is suffering from any of the impairments stated therein. The affidavit was taken by a Board agent, and would appear to meet the tests of reliability set forth in Rule 804(b)(5), although the Company did not make known to the General Counsel in advance of trial its intended use of the affidavit, in compliance with the Rule. However, the General Counsel's position at hearing amounts to a waiver of this requirement. Accordingly, Reeves' affidavit is hereby received in evidence, for the reasons explicated in *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978), *enf. den.* on other grounds, 598 F.2d 1267, 101 LRRM 2457 (2d Cir., 1979).

I conclude that Russell's statements were not threatening in nature. Although Kirbo's statement used racially opprobrious terminology, it was not a threat. Finally, Favors' statements are clearly threatening, but are not specified in his separation notice. I infer that Company knowledge of Favors' statements was not acquired until after his discharge and therefore that those statements were not a contributing factor in his discharge. Accordingly, I find that the Reeves' affidavit does not establish any misconduct on the part of any of the above-named employees which played a part in any of the discharges.

(k) *Robin O. Boudrie—Alleged Profanity to Supervisor*

Boudrie's termination statement alleges that a management representative told him that he was engaged in improper picketing, and that he responded, "Go to hell."

The Company's strike log for December 5 states that Boudrie and others were picketing, that Broughton Kelly told him they were doing so improperly, and that "one of them" told him to "go to hell." Kelly testified about a December 5 encounter with pickets, including Boudrie, but did not allege any statements by them. This is clearly insufficient to sustain the allegation in the separation notice.

(l) *Donald Ray Thrash—Alleged Mass Picketing*

The employee's separation notice states that he engaged in mass picketing and blocking access to the plant. There is no evidence in support of this allegation.

The Company has presented other evidence of misconduct regarding various employees, not alleged in their separation notices. I have not considered this evidence because of the fact that it was not stated on the separation



notices. Whether these allegations are true or not, the Company would have had to possess knowledge of any such conduct prior to the discharge in order to claim it as a cause of same. From the absence of any such allegations on the separation notices, I infer that the Company did not have such knowledge.

#### 4. *Alleged Post-Strike Discrimination*

##### (a) *Clarence Watson and Wiley Shepherd*

The first complaint alleges that the Company discharged Watson and Shepherd<sup>34</sup> on December 20, 1979, because of their Union activities. Watson and Shepherd were strikers who attempted to return to their former jobs in the log yard on December 10.<sup>35</sup> These jobs, however, had been filled by permanent replacements and the employees were not employed on that date, but were placed on a preferential hiring list. About 10 days later, Watson and Shepherd were notified to come back to work, and were offered jobs in the storeroom at a substantial cut in pay. Both declined these jobs, and were thereafter terminated. In February 1980 both were offered their former jobs, and accepted. Although the stipulation of the parties makes it uncertain which shift Watson had, Shepherd simply testified that he returned to his former job.

The General Counsel concedes that the Company was not required to return economic strikers to substantially equivalent jobs, if none were available because they had been filled by permanent replacements. However, he

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34. The spelling of Shepherd's name appears as given in the official transcript rather than the complaint.

35. Of the two alleged discriminatees, only Shepherd gave testimony. The Company argues that an adverse inference should be drawn from the fact that Watson did not testify. However, Lawler's testimony is sufficient to warrant the findings made herein about Watson.



argues that an employer may not appropriately discharge such striker because of the latter's refusal to accept a lesser job, and, as noted, the complaint alleges that Watson and Shepherd were discharged because of their Union activities.

The Company denies the charge of discriminatory motivation, and argues that even if the discharges were "inappropriate," the employees suffered no legal damage. As economic strikers, they were entitled to no more than placement on a preferential hiring list so long as their jobs were filled by permanent replacements, and they were put back to work as soon as jobs were available.

There is little or no dispute about the facts, and only legal issues are presented.

(b) *Mary Burth and Carlene Frost*

The second complaint alleges that the Company, on February 12, 1980, refused to pay accrued vacation pay to the above-named employees because of their Union activities, in addition to allegation in the first complaint that they were discriminatorily discharged.

Article 22 of the labor agreement which expired November 15 provides *inter alia* that employees hired prior to February 2, 1978, with one or more years of continuous service, shall be entitled to two weeks of vacation, provided that the employee worked not less than 1,800 hours during the preceding calendar year. A vacation roster is posted in January, and employees have until March 1 to select vacation weeks. The Company may allow vacation pay in lieu of time off. Neither vacations nor vacation pay shall be accumulative from one year to another. "Voluntary termination of employment or discharge shall constitute a complete break in service continuity and no past service shall be credited in case of re-employment."

Carlene Frost's separation notice<sup>36</sup> states that she was employed from October 19, 1976 to November 15, 1979, at which time she was terminated for allegedly engaging in mass picketing and blocking access to the plant. Mary Burth's separation notice states that she was employed on March 29, 1976, and was terminated at the same time as Frost for the same alleged reason. As described above, the Company has not submitted proof sufficient to establish any such conduct on the part of either employee.

Frost testified that, a few days after the strike began, she and other strikers were picking up their pay from Company employee Margaret N. Gregory at "Bill's Dollar Store." Frost asked Gregory about the "vacation checks," and Gregory replied that they would probably be in the following week. When Frost returned the following week, Gregory said that the checks had come in, but had to be sent back. McCollum was present, and said that the employees were not going to get the vacation checks. At one of McCollum's February 1980 meetings with returning employees, he was asked about vacation checks, and said he would check into it. Frost has heard nothing further about the subject.

Mary Burth corroborated Frost's testimony regarding McCollum's statements in February. The witness said that she received her 1980 vacation pay, but received only one instead of two weeks for 1979. As to the latter, the witness stated that she had the requisite 1,800 hours.

Industrial Relations Director Broughton Kelly testified that Frost and Burth had requested vacation pay, but had not received it. The reason, he stated, was that the employees had not requested vacations or vacation pay in the year in which it was due, and that vacations could not

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36. Frost's separation notice lists her as "Merriam C. Frost."

be carried forward into another calendar year. He believed that one of the employees did not have the requisite 1800 hours, but was not sure.

### *Analysis of the Evidence*

I find that both Frost and Burth had satisfied the contractual requirements for entitlement to two weeks of vacation pay for 1979. It is clear from their separation notices that both were hired prior to February 2, 1978, and had at least one year of continuous service. Under the contract, entitlement to 1979 benefits required at least 1,800 hours of work in the preceding calendar year, i.e., 1978, plus a timely request.

Burth testified that she satisfied the 1,800 hour requirement although Frost was silent on this subject. However, Frost credibly testified that, in response to her inquiry to Gregory at "Bill's Dollar Store," Gregory replied that the checks had come in but had to be sent back. McCollum said to Frost at "Bill's Dollar Store" that the employees were not going to get them. From these facts I infer that both Frost and Burth had satisfied the formal requirements for two weeks of vacation, or pay in lieu thereof, since it is unlikely that the checks would have received this amount of processing without being due and payable to the employees. Broughton Kelly's testimony to the contrary is not as persuasive as the routine of business office practice, and, moreover, did not appear to be based on sure knowledge of the facts. I also credit Frost's and Burth's testimony that they asked about their checks in February 1980, that McCollum said he would check into it, and that neither has heard anything about the matter since that time.

I therefore conclude that Frost and Burth satisfied the contractual requirements for two weeks of vacation,

or pay in lieu thereof, for 1979, but were not completely paid by the Company.

##### 5. *Legal Analysis of Alleged Section 8(a)(3) Violations*

###### (a) *The Issue of Discriminatory Motivation*

As described above, there were at least twice as many strikers as the 28 alleged discriminatees. This is based on Lawler's testimony that she saw about 60 pickets during the first days of the strike. If McCollum's estimate of 140 pickets is correct, the number of strikers compared to alleged discriminatees is even greater. The total employee complement was about 200.

Other than the alleged discriminatees, the strikers were put back to work on the second shift when the strike ended, with some exceptions who were placed on a preferential hiring list. There is no suggestion that any of these strikers were subjected to any unfair labor practices. The Company asserts that it singled out the 28 alleged discriminatees because of strike misconduct.

In similar circumstances, Board and court cases have concluded that absence of employer disciplinary action against some employees engaged in protected activity is evidence that disciplinary action against other such employees was not discriminatorily motivated.<sup>37</sup> I conclude that this evidentiary principle is determinative herein on the issue of the Company's motivation.

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37. *Teledyne McCormack Selph, A Division of Teledyne, Inc.*, 246 NLRB No. 127 (1979); *Pedro's Inc. d/b/a Pedro's Restaurant*, 246 NLRB No. 92 (1979); *Triana Industries, Inc.*, 245 NLRB No. 161 (1979); *Bill Kraft's Restaurant Food Products Co.*, 241 NLRB No. 162 (1979); *J. Ray McDermott & Co., Inc.*, 233 NLRB 946 (1977); *B. F. Goodrich Co.*, 232 NLRB 1066 (1977); *Winn-Dixie Stores, Inc. v. N.L.R.B.*, 448 F.2d 8, 78 LRRM 2375 (4th Cir., 1971), *enf. as mod.* 181 NLRB 611 (1970); *Hyster Co. v. N.L.R.B.*, 480 F.2d 1081, 83 NLRB 2801 (5th Cir., 1973), *enf. as mod.* 198 NLRB 192 (1972).

It may further be noted that there is a dearth of anti-union statements and action by the Company. All of the alleged independent violations of Section 8(a)(1) are without foundation and should be dismissed, except the Company's statement to employees that there was no formal grievance procedure. This latter statement was accurate in the sense that there was no existing contract at the time, and becomes a violation only because of the somewhat esoteric principle that the grievance procedure survives the expired contract. I conclude that the Company was simply unaware of this requirement, and that McCollum's statements reflected lack of knowledge and indecision, rather than anti-union animus. This conclusion is buttressed by the fact that in all other respects the Company was quite scrupulous in its observation of employee rights—such as the policy of having a Union steward present during disciplinary interviews, where possible and where desired by the employee.

I find no merit in the General Counsel's argument that the Company's delay in notifying employees of their discharges is evidence of unlawful motive. The evidence is persuasive that Company disciplinary policy was consultative in nature, with final authority in some cases being exercised by Broughton Kelly. There is an inevitable delay in any such policy. There is also the fact that most of the discharges were not present in the plant at the time of the alleged conduct warranting dismissal.

Finally, the Company delayed in such notification not because of any discriminatory motivation, but, rather, because it sought Union agreement on the subject of discipline of employees. Although the separation notices are dated November 15, the Company initially hoped to avoid conflict on this subject with the Union. Broughton Kelly said that he wanted to "get on board" with this subject,

and first broached it in the December 3 negotiating session, as described above. At that date, according to his credible testimony, the Company was willing to consider discipline less than discharge. However, the Union failed to agree then and also failed to agree to the Company's December 19 Memorandum of Understanding incorporating the subject of discipline. The Company discharged the employees the following day, December 20, 1979. Rather than constituting evidence of unlawful motive, the Company's delay in discharging the employees evidences its desire to obtain accord with the Union on this subject.

The grounds which the Company sought to establish for Union approval of striker discipline further show that concern for misconduct rather than anti-union animus was the motivating force in the Company's action. Thus, it is quite clear that serious misconduct did occur. A gun was pointed at the plant manager, the wires to the boiler were cut, and a rock was thrown at a supervisor's car, to name a few. It is true that not all the Company's accusations of misconduct are warranted, and that it may not justifiably impute general misconduct to a specific employee absent proof involving that individual.<sup>38</sup> However, the rather widespread acts of violence and near violence, culminating in the state court injunction, suggest that the Company had a genuine problem, and that it was that problem rather than opposition to the Union which caused it to take the action that it did.

In the final analysis, the employees were discharged on December 20. Actually, the Company denied them work on December 10, at the time the other strikers returned and were put back to work. As previously indi-

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38. *American Cyanamid Co.*, 239 NLRB No. 60 (1978).

cated, I conclude that this action by the Company constituted disciplinary suspension of the employees on December 10, because of alleged misconduct during their exercise of protected activity, to wit, the strike.

It is established law that the discharge of an employee engaged in protected activity, for alleged misconduct which did not in fact occur, violates Section 8(a) (1) of the Act regardless of the employer's motivation.<sup>39</sup> Although the discharges did not technically take place until December 20, 1979, there is no logical reason why the same principle should not apply to the disciplinary suspensions on December 10. These considerations make necessary a legal assessment of the individual acts of alleged misconduct described above.

#### (b) *Legal Analysis of Individual Misconduct*

##### 1. *Violence and threats of violence*

Strikers Scott Fowler's clenching his fist and pointing a gun at Plant Manager McCollum are serious acts of misconduct warranting discharge, and I so find.

As set forth above, the evidence establishes that striker Crosby Favors threw a rock which hit Supervisor Virgil Williams' car as the latter was passing through the picket line. The Board has concluded that discharges based on similar conduct were lawful,<sup>40</sup> and the same conclusion is warranted herein.

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39. *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Roadway Express, Inc.*, 250 NLRB No. 61 (1980). Where the employer proves an "honest belief" in the alleged misconduct, the burden then shifts to the General Counsel to establish that the employee did not in fact engage in such conduct or engaged in other conduct not sufficiently grave to warrant discharge. *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952).

40. *Gold Kist, Inc.*, 245 NLRB No. 142 (1979); *Giddings & Lewis, Inc.*, 240 NLRB No. 64 (1979); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973); *Spotlight Company Inc.*, 192 NLRB 491 (1971).



The credited evidence establishes that Landis Bishop and Jeffrey A. Hughes visited a nonstriking employee at his home and, in the presence of his family, threatened him with bodily injury if he returned to work. The Board and one Circuit Court of Appeals have decided that similar action warranted discharge of employees,<sup>41</sup> and I find that this principle is applicable to Bishop and Hughes.

As heretofore delineated, the only striker comment to job applicant Raymond Reeves which was threatening was that of Crosby Favors, who said that he would not be responsible if something happened to Reeves, and that something might happen to his children. However, this threat was not alleged in Favors' separation notice, and therefore could not have been a cause of the Company's first suspending and then discharging him. In any event, I have already determined that Favors engaged in other misconduct warranting discharge.

Although the credited evidence shows that Joseph M. Williams made statements to other employees about supervisors "getting their asses whopped," and similar statements, he did not make these statements directly to supervisors. I therefore find that Williams did not make threatening statements to supervisors warranting discharge, as alleged in his separation notice.

## 2. *Obscene and abusive language*

Industrial Labor Relations Manager Barbara Lawler heard Preston D. Barlow make the profane statements about her, described above, as she drove through the picket line.

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41. *Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408 (1975); *New Fairview Hall Convalescent Home*, *ibid.*; *N.L.R.B. v. Syncro Corp.*, 597 F.2d 922, 101 LRRM 2790 (5th Cir., 1979), *den'g. enf.* 234 NLRB 550 (1978).



Board cases on employee profanity to supervisors as grounds for discharge come down on both sides of the issue. On the one hand, it is held that such language is customary in industrial settings.<sup>42</sup> There are, however, cases which conclude that profane language to supervisors constitutes misconduct of sufficient gravity to warrant disciplinary action.<sup>43</sup>

Some cases appear to make distinctions based on the sex of the employee or supervisor involved, considering offensive remarks to be more opprobrious if made to a female.<sup>44</sup> One Circuit Court of Appeals described similar language, and an overt gesture, as "vulgar and offensive by any standard of decency."<sup>45</sup>

I find that Barlow's statements about a supervisor, made within her hearing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge. In making this determination, I take into account the minimal anti-union animus on the part of the Company, and the consequent likelihood that it was Barlow's statements rather than his strike activity which precipitated the Company's action.

The facts involving Joseph M. Williams' statements about Lawler and Eley require a different conclusion, however. Neither Lawler nor Eley heard the statements, which were made to other employees on the morning of November

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42. *Van Guard Carpet Mills*, 246 NLRB No. 106 (1979); *Publisher's Printing Co., Inc.*, 246 NLRB No. 36 (1979).

43. *Rockland Chrysler Plymouth, Inc.*, 209 NLRB 1045 (1974). See also *Atlantic Steel Co.*, 245 NLRB No. 107 (1979), where the Board overruled the Administrative Law Judge on this issue and deferred to an arbitrator's award.

44. *Veeder-Root Co.*, 192 NLRB 973 (1971).

45. *Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815, 94 LRRM 2225, 2228 (5th Cir. 1977), den'g. enf. 220 NLRB 1127 (1975).

15 a few minutes before the strike began, in an atmosphere of turbulence. It is obvious that offensive remarks have greater impact if made to, or heard by, the person about whom they are made. I conclude that Williams' remarks about Lawler and Eley, not heard by either of them, were not serious enough to justify his discharge.

### 3. *Property damage*

It is clear that the Company suffered at least some property damage directly caused by deliberate human action, such as the cutting of wires leading to the boiler, and nails in the driveway causing flat tires. As noted, the evidence does not link this to identified strikers. Other acts of "sabotage" alleged by McCollum are less clear, such as the bullet in the chipper.

In the "slingshot incident," where Faulkner, Fowler, and Palmer were charged with attempting to break an overhead light, they were actually shooting at a bird on a railroad boxcar. Granting that the Company may have believed in good faith that the employees were attempting to shoot out a light, this belief was mistaken, and the allegation does not serve as justification for discharge.<sup>46</sup>

### 4. *Alleged slowdown*

The evidence shows that James Kelly told McCollum that he and others had planned a slowdown, but that this did not take place because of mechanical breakdowns. The Company had no reasonable grounds to believe that one had taken place, based on Kelly's statement to McCollum. The actual conduct was therefore only talk about an inchoate slowdown which never took place. The Board has concluded that where employees merely engaged in

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46. *The Blair Process Co., Inc.*, 199 NLRB 194 (1972).

"tentative and untested" sentiments against working alone, there was no partial strike warranting discipline,<sup>47</sup> and the same principle is applicable in James Kelly's case. If the Company had a good faith but erroneous belief that Kelly had done so, the result would not be different.<sup>48</sup>

### 5. *Summary of misconduct cases*

For the reasons given above, I find that strikers Scott Fowler, Crosby Favors, Landis Bishop, Jeffrey A. Hughes, and Preston D. Barlow engaged in strike misconduct, known by the Company prior to their discharges, of sufficient gravity to warrant such discipline. I also find that none of the other alleged discriminatees charged by the Company with misconduct<sup>49</sup> actually engaged in same.

#### (c) *The Company's Defense Based on the Union's Telegraphic Application for Reinstatement*

The Company argues that, issues of striker misconduct aside, none of the strikers was entitled to reinstatement because the Union's December 9 telegram was not an unconditional application for same in that it stated that employees would return to work "on their regularly assigned shifts." The Company analogizes this to the union's telegram in *H. & F. Binch Co.*,<sup>50</sup> stating that all striking employees will return to work "provided you agree to take

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47. *Carlson Roofing Co., Inc.*, 245 NLRB No. 4 (1979).

48. *N.L.R.B. v. Clinton Packing Co., Inc.*, 468 F.2d 953, 81 LRRM 2733 (8th Cir., 1972), *enf'g.* as mod. 191 NLRB 879 (1971).

49. Kenneth V. Palmer, Phillip J. Faulkner, Charles Brown, James Kelly, Jerry Kirbo, John Ward, Mary Burth, Robert Barry McCoy, Anthony Crouch, Eulice Favors, Cecil Barber, Carlene Frost, Yvonne Blalock, James O'Neal, Joseph M. Williams, Robin O. Boudrie, Michael W. Buttram, Robert L. Russell, Donald Ray Thrash, Stephen C. Smith.

50. *H. & F. Binch Co.*, 188 NLRB 720 (1971), *enf. as mod.* 456 F.2d 357, 79 LRRM 2692 (2d Cir., 1972).

everyone back without discrimination.”<sup>51</sup> and apparently contends that *Binch* is authority for its argument that the telegram herein was not an unconditional application.

This argument lacks merit if only because the chronology in *Binch* is the reverse of the one in the instant case. In *Binch*, a group of permanently replaced strikers first appeared at the plant and asked to return. “By thus offering themselves for work,” the Board held, “these replaced strikers made it clear that they were seeking reinstatement.” They had “made an unconditional offer to return to work by virtue of their appearance for work. . . .”<sup>52</sup> Later, however, the union sent the telegram quoted above, and the Board held that this nullified the unconditional character of the strikers’ offer to return.

In the instant case, the Union first sent the telegram, on December 9, stating that the employees would return on December 10 to “their regularly assigned shifts.” The employees *thereafter* presented themselves on December 10, and, as the record shows, accepted work on the second shift, since their former jobs on the first shift had been filled by permanent replacements. The Company, however, singled out those employees charged with misconduct, and told them that there was “no work” for them, or that their status was being investigated, or determined.

The Company had no reason to believe that these employees would not have accepted second shift jobs as the other strikers were doing, the Union’s telegram notwithstanding. The matter was never put to a test, and, instead, these strikers were suspended. I find that all the strikers, by their appearance at the plant on December 10, and by their demonstrated willingness to accept jobs on shifts

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51. *Ibid.*, 188 NLRB at 724.

52. *Ibid.*

other than their former shifts, cured whatever defect there may have been in the Union's telegram, and thereby made an unconditional application for reinstatement.

The technicalities of the reinstatement application are not relevant to the Company's further action in discharging employees on December 20 for alleged misconduct. It would have been futile for the alleged discriminatees to have made applications for reinstatement thereafter, in light of the Company's charges. Accordingly, those strikers who were discharged without good cause were entitled to reinstatement without having made any further application for same.<sup>53</sup>

(d) *Legal Conclusions on Strikers Erroneously Charged with Misconduct*

I conclude that the Company, by suspending on December 10, 1979, and discharging on December 20, those strikers charged with misconduct who had not actually engaged in same,<sup>54</sup> at a time when they were engaged in protected activity, thereby violated Section 8(a)(1) of the Act.<sup>55</sup>

(e) *Clarence Watson and Wiley Shepherd*

As economic strikers who had been permanently replaced, Watson and Shepherd were still "employees,"<sup>56</sup> and under existing law were entitled to remain on a preferential hiring list until substantially equivalent jobs became

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53. *Sigma Service Corporation*, 230 NLRB 316 (1977).

54. See fn. 49, *supra*.

55. *N.L.R.B. v. Burnup & Sims, Inc.; Roadway Express, Inc.*, *supra*, fn. 39.

56. See authority discussed in *Little Rock Airmotive, Inc. v. N.L.R.B.*, 455 F.2d 163, 79 LRRM 2544 (8th Cir., 1972), *enf. as mod.* 182 NLRB 666 (1970).

available. By discharging them for refusing to accept something less than full reinstatement, the Company deprived them of continued placement on this list.

It is very well to argue, as does the Company, that Watson and Shepherd suffered no damages because no such jobs became available until February 1980. On the present record there is no way of disproving this. On the other hand, the only way of establishing the existence of such jobs prior to February 1980, and of Watson's and Shepherd's entitlement to them, would have been their continued presence on the hiring list. The Company could hardly have been expected to seek out employees whom it had discharged, nor is it likely that they were retained on the list. By evicting them from this preferred position, the Company effectively denied them any opportunity to establish the earlier existence of the same or equivalent jobs.

Over and above the rights of Watson and Shepherd, it would have a chilling effect on the right of employees to strike over economic matters if the employer, having hired permanent replacements during the strike, and upon the strikers' application for reinstatement, could compel them to accept lesser jobs or forfeit employee status. I conclude that by discharging Watson and Shepherd for refusing to accept lesser jobs, the Company thereby interfered with their Section 7 rights in violation of Section 8(a)(1) of the Act.

(f) *Denial of Vacation Benefits to Carlene Frost and Mary Burth*

The Board has held with judicial approval that where an employer conditioned payment of accrued vacation benefits to employees on their cessation of an economic

strike, and failed to submit adequate business justification for its conduct, a violation of Section 8(a)(3) of the Act was established without specific proof of unlawful motive.<sup>57</sup> The Board interpreted the Supreme Court's ruling in *Great Dane Trailers*,<sup>58</sup> distinguishing between "inherently destructive" and "comparatively slight" discrimination, and found the conduct to be violative of the Act because the Company submitted no justification. In its enforcing decree, the Court of Appeals for the District of Columbia Circuit found it unnecessary "to tread the uneasy path between 'inherently destructive' and 'comparatively slight' discrimination," since the Company failed to prove a substantial business justification for its conduct.<sup>59</sup> Even if the respondent's position on discrimination had been accepted, the facts were sufficient to establish a violation of Section 8(a)(1).<sup>60</sup>

In the instant case, the Company offered no sufficient reason for its refusal to pay Frost and Burth their accrued vacation pay. In accordance with the Board's reasoning in *Cavalier*, I find that by denying Frost and Burth their accrued vacation pay, without adequate business justification, the Company violated Section 8(a)(3) and (1) of the Act.<sup>61</sup>

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57. *Cavalier Division of Seeburg Corp.*, 192 NLRB 290 (1971), enf. as mod., sub nom *Allied Industrial Workers, AFL-CIO, Local Union No. 289 v. N.L.R.B.*, 476 F.2d 868, 82 LRRM 2225 (DC Cir., 1973).

58. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

59. *Allied Industrial Workers*, supra, fn. 57, 82 LRRM at 2231.

60. *Ibid.*, 82 LRRM at 2231, fn. 18.

61. I make no finding on the Company's motivation, as none is required under Board's rationale in *Cavalier*, supra, fn. 57.



(g) *Terri Bowden Fuller*

The evidence shows that, although Fuller was a striker and was known as such by the Company, she was also a probationary employee with a record of unacceptable absenteeism. The Company had a practice of discharging other probationary employees for similar infractions. Because of the minimal evidence of anti-union animus by the Company, the fact that Fuller was absent as charged, and the fact that the Company was following its customary practice in dealing with probationary employees, I conclude that the Company did not violate the Act by its discharge of Fuller.<sup>62</sup>

The refusal of the Company to process a Union grievance over the Fuller discharge was not violative of the Act, because the contract gave Fuller, a probationary employee, no right to such proceeding, and the grievance was not presented in conformity with the contract terms. However, McCollum did violate Section 8(a)(1) when he told Union steward Prather in December 1979, during a discussion of the Fuller discharge, that there was no formal grievance procedure. This was similar to his unlawful statements to returning employees in February 1980, discussed above.

D. *Supplemental Legal Analysis of Alleged Section 8(a)(5) Violation and Conclusions of Law*

As described above, ruling was reserved on the General Counsel's argument that the Company violated Section 8(a)(5) by its demand that the Union agree to the discharge of strikers accused of misconduct. As I have just determined, some of those discharges were unlawful—of

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62. *Federal Pacific Electric Co.*, 195 NLRB 609 (1972).



employees whose names appeared on the "discharge" list given by Broughton Kelly to Henson on December 3.

It is true that *Nordstrom*<sup>63</sup> involved discharges violative of Section 8(a)(3), whereas the discharges here in issue violate Section 8(a)(1), and it is also true that the Board in *Olin*<sup>64</sup> speaks of an employer's right to discharge employees so long as his motive is not "discriminatory."<sup>65</sup> However, the discharges herein were also contrary to the principles of the Act for the reasons set forth in *Burnup and Sims*,<sup>66</sup> and tended to "frustrate the bargaining process"<sup>67</sup> as did the union's demand for reinstatement in *Olin*. I therefore conclude that the Company additionally violated Section 8(a)(5) by demanding to impasse the Union's agreement to a nonmandatory subject of bargaining, to wit, the discharge of employees who had not engaged in misconduct warranting such discipline.

In accordance with my findings above, and upon consideration of the entire record, I make the following:

#### Conclusions of Law

1. Georgia Kraft Company, Woodcraft Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' Local Union No. 246 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the the following conduct, the Company committed unfair labor practices in violation of Section 8(a)(1) of the Act:

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63. *Nordstrom, Inc.*, *supra*, fn. 8.

64. *Olin Corporation*, *supra*, fn. 9.

65. *Supra*, fn. 10.

66. *N.L.R.B. v. Burnup & Sims, Inc.*, *supra*, fn. 39.

67. *Supra*, fn. 10.

(a) Telling employees that there was no formal grievance procedure, where such employees had been subject to a recently expired collective-bargaining agreement which contained such procedure.

(b) Discharging strikers Clarence Watson and Wiley Shepherd on December 20, 1979, for refusal to accept jobs which were not substantially equivalent to their former jobs.

(c) Suspending on December 10, 1979, and discharging on December 20, 1979, the following-named employees for engaging in alleged strike misconduct warranting such discipline, when in fact the employees had not engaged in same:

Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robery Barry McCoy	Robert L. Russell

4. By failing and refusing to pay accrued vacation pay to Carlene Frost and Mary Burth, without adequate business justification for such refusal, the Company violated Section 8(a) (3) and (1) of the Act.

5. By insisting to impasse that the Union agree (a) to withdraw charges previously filed with the National Labor Relations Board and the courts, and (b) to the discharge of employees for alleged misconduct in which they

had not in fact engaged, the Company thereby insisted on non-mandatory subjects of bargaining in violation of Section 8(a) (5) and (1) of the Act.

6. The Company has not engaged in any other unfair labor practices.

#### IV. The Remedy

It having been found that the Company has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Company violated Section 8(a) (1) of the Act by the suspension and/or discharge of the employees named in Conclusions of Law 3(b) and 3(c), the Company shall be ordered to make them whole for any loss of pay or other benefits they may have suffered as a result of their unlawful suspensions and/or discharges.

As for the employees listed in Conclusions of Law 3(c), who were discharged for alleged misconduct, but who were returned to work in February 1980, the Company shall be ordered to pay them backpay with interest<sup>68</sup> from the time of their disciplinary suspensions on December 10, 1979, until the time of their return to employment in February 1980,<sup>69</sup> and to credit their employment records for the same period with working time for vacation and seniority purposes.

The Company shall also be ordered to credit for such purposes the employment records of Clarence Watson and

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68. See *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

69. *Roadway Express, Inc.*, *supra*, fn. 39 (sl. op., p. 8, fn. 7).

Wiley Shepherd from December 20, 1979, the date of their unlawful discharges, until the dates of their return to employment. In addition, the Company shall be ordered to reconstruct, on a daily basis, its personnel records since the time of their discharges, for the purpose of establishing whether any substantially equivalent job became available for either of them prior to the time when he returned to employment with the Company. In the event that such reconstruction of personnel records establishes that there was such prior job, and that the Company would have hired Watson or Shepherd, in the order and according to the method which it was then utilizing, had such employee been on a preferential hiring list, then the Company shall be ordered to make such employee whole by paying him backpay from the date of availability of such job to the date he returned to employment with the Company, with interest.<sup>70</sup>

It having been found that the Company unlawfully failed and refused to pay Carlene Frost and Mary Burth accrued vacation pay in violation of Section 8(a)(3) and (1) of the Act, the Company shall be ordered to pay said vacation pay to them, with interest from the date that such vacation pay would normally have been paid.<sup>71</sup>

It having been found that the Company has refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom, and, upon request, bargain with the Union.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

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70. *Supra*, fn. 68.

71. *Ibid.*

ORDER<sup>72</sup>

Georgia Kraft Company, Woodcraft Division, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Telling its employees that there is no grievance procedure.

(b) Suspending, discharging, or otherwise disciplining employees for alleged misconduct in which they have not engaged.

(c) Discharging employees for refusal to accept jobs which are not substantially equivalent to their former jobs.

(d) Failing and refusing to pay accrued vacation pay to employees who are entitled to same; or

(e) Refusing to bargain in good faith with Laborers' Local Union No. 246.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay each of the following listed employees back-pay from December 10, 1979, until such time as he or she returned to employment with the Company, in the manner set forth in the section of this Decision entitled "The Remedy," and credit the employment record of each such employee, for such period, with working time for seniority and vacation purposes:

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72. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robert Barry McCoy	Robert L. Russell

(b) Credit the employment records of Clarence Watson and Wiley Shepherd with working time from December 20, 1979, until such time as each of them returned to employment with the Company, for seniority and vacation purposes.

Prepare and submit to the Regional Director for Region 10 a reconstructed daily record of available jobs and names of incumbents holding such positions, including the date of their hire, and vacancies, if any, for the same period indicated above.

In the event that such reconstructed record shows that the same job held by Watson or Shepherd, or a substantially equivalent one, became available prior to the time such employee was rehired, make him whole for any loss of pay he may have suffered by reason of the Company's unlawful discharge of him, in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Make whole Carlene Frost and Mary Burth by paying each of them two weeks' vacation pay for 1979, to the extent that they have not already received same,

with interest as set forth in the section of this Decision entitled "The Remedy."

(d) Upon request, bargain with Laborers' Local Union No. 246, and, if agreement is reached, embody same in a written agreement.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the extent of the Company's actions required to comply with this Order, and the amount of backpay due.

(f) Post at its plant at Greenville, Georgia copies of the attached notice marked "Appendix."<sup>73</sup> Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by the Company's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply therewith.

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73. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found.

Dated at Washington, D.C. December 18, 1980.

/s/ Howard I. Grossman  
Howard I. Grossman  
Administrative Law Judge

**EXCERPTS FROM ADMINISTRATIVE  
HEARING TRANSCRIPT**

[715] Whereupon,

**WILLIAM ALAN WALKER**

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

**JUDGE GROSSMAN:** Please, be seated.

**THE WITNESS:** (Complying.)

**MR. RHAUDABAUGH:** Mr. Walker, I'm going to ask you several questions and if at any time you do not understand the question or you do not hear me ask the question clearly or, for that matter, I'm sure the same goes for Counsel for General Counsel, this gentleman seated here to my left, please ask us to repeat the question.

**DIRECT EXAMINATION**

**BY MR. RHAUDABAUGH:**

**Q.** Would you state your full name and address for the record? **A.** William Alan Walker, 126 Flat Shoals Road, Woodbury, Georgia.

**Q.** Are you—With whom are you employed? **A.** Woodkraft.



Q. And, where are you employed? A. It is located in Greenville.

Q. How long have you been employed at this plant?

A. September will be a year.

[716] Q. Were you employed during the Fall of 1979?

A. Yes, sir.

Q. Do you recall that a strike took place? A. Yes, sir.

Q. Do you recall, approximately, the duration of the strike? When it began and when it ended? A. I believe it was the 15th of November. I think it was over on the ninth or 10th of December.

Q. Do you recall any particular events that occurred during the strike with which you became involved? A. Yes, sir. I had two Union employees visit my home.

Q. Could you tell us, approximately, the time of day and, approximately, the date? A. I believe it was Tuesday—the Tuesday after Thanksgiving.

Q. And, approximately, what time of day was it, if you recall? A. It was 7:15—around 7:15 in the evening.

Q. And, before we go on, do you recall—Can you identify the persons who visited you? A. Yes, sir. One is Landis Bishop and Jeff Hughes.

Q. Did these individuals work at the plant? A. Yes, sir, they did.

Q. Will you tell us what happened once they came to your house? [717] A. (No response.)

Q. What—what happened? A. They come to my door and I asked them what they wanted and they said they wanted to talk to me and I asked them in reference to what and they said about me returning to work, why did I return to work, why was I not on the picket lines, that I was Union member and that my name was called and that I was not there, that I could be fined by the Union and also

fired from my job because of it—because I wasn't attending the meetings or anything.

Q. Did you have anything to say? A. Yeah. I told them that I needed the money and that I had tried to go along with the strike, but I was not a Union member and they told me that I was. When I had returned to work, crossing the picket line, I had found out that—Landis Bishop had told me the day of the strike, earlier that day, that—that I was a member and that my probationary period was up. I found out when I returned to work during the strike that it was not up and that I had a couple of more days to go and from him telling me that, I asked Personnel—the Personnel lady, Ms. Gregory, to throw my card away; that I did not want to join the Union.

Q. Now, you say they came—they came to your house and they said that you could be fined and something to the effect that you should be on the picket line. [718] A. Right.

Q. Is that all they said? A. No, that's not all they said. They were sloppy drunk. They reaped of liquor. I could—I smelled it when I immediately opened the door and I didn't want to talk to them to begin with. They were not asked to come to my house and I asked them to leave when I first opened the door, that I did not want to talk with them; and, they were laughing and saying, well, they just wanted to talk. Well, I said, all right; you know, they started talking.

And, they was telling me I was taking their God damn money away from them; screwing them out of their God damn money is what they said, in effect, and Landis Bishop said this and Jeff Hughes was backing him up and repeating what he said. I immediately asked them not to cuss because my little girl was in the room with me and my wife was there. My wife was pregnant at that time and I had

her take my little girl and leave the room, but my little girl come back in the room and my wife stayed in the kitchen because she was pregnant and I did not want her upset.

They was standing in there and they was—Let's see, it was Landis Bishop. Bishop told me that if I returned to work that he would take care of me and I asked him what he meant by that and he started laughing and Jeff said, "yeah, we'll take care of you." I asked them—I said, "what do you [719] mean by that?" I repeatedly was asking him and he was talking about that I shouldn't have been crossing the picket line and Jeff Hughes called me a "sorry mother fucker" for taking their money away from them. My little girl was standing right beside me. I couldn't leave them and try to get her out of the room.

This continued and I continued to ask for them not to cuss and I kept asking them to leave when they started cussing, but they refused to do that.

Q. Did they eventually leave? A. Yes, they did.

MR. RHAUDABAUGH: I have no further questions at this time.

JUDGE GROSSMAN: Cross-examination?

### CROSS-EXAMINATION

BY MR. LEVY:

Q. When you came to the door, Mr. Walker, and these two men were there, you said that you opened the door, but there was a screen there, was it not? A. Yes, sir.

Q. The screen door was locked while you were speaking with these men, was it not? A. Yes, sir.

Q. Did they try to forcibly come in? [720] A. No, sir, they didn't.

Q. When you asked them to leave, did they? A. No, they didn't.

Q. What did you do? A. I asked them to leave and I started to shut the door, but they kept on talking. So, I was, you know, trying to be considerate and listen to what they said in hopes that they would leave.

Q. You were trying to be considerate despite the fact that, according to your testimony, they were using language that you didn't feel was appropriate; your small daughter was there and you didn't want her to hear it; your pregnant wife was not to be upset. A. I had a glass front door. There is no way that I could have prevented them, my shutting the door. They could have come in my home if they wanted to.

Q. I understand that, sir; but, what I was asking you, you asked them to leave and when you start to shut the door—I think you told us—they are using language that you did not approve of and you told us why and, yet, as a matter of courtesy to them, you're going to continue standing there to speak with them. Is that your testimony? A. In a sense, yes.

MR. LEVY: I have no further questions.

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[1126] MR. LEVY: May we be off the record briefly while we arrange for Mr. Landis Bishop to be our next witness?

JUDGE GROSSMAN: Off the record.

(Off the record.)

JUDGE GROSSMAN: On the record.

Whereupon,

LANDIS R. BISHOP

having been first duly sworn, was called as a Witness herein and was examined and testified as follows:

DIRECT REBUTTAL EXAMINATION

BY MR. LEVY:

Q. May we have your name, please, sir, and your address? A. Landis Ray Bishop, Route 1, Box 63, Luthersville, Georgia.

Q. Mr. Bishop, have you ever worked for Georgia Kraft over in Greenville? A. Yes, I have.

Q. Before the strike, how long did you work for them? A. Approximately 18 months.

Q. Mr. Bishop, I want to direct your attention to any occasion that you may have had to speak to an employee or employees who were working during the course of the strike. Did that ever happen? A. Yes, sir, it did.

[1127] Q. Do you ever remember speaking with anybody by the name of William Walker? A. Yes, sir.

Q. Do you remember when that was, sir? A. I don't remember an exact date; no, sir, sometime shortly after the strike started.

Q. Do you remember where you spoke with Mr. William Walker? A. Mr. Walker's home.

Q. And was anyone with you on that occasion, other than just yourself? A. Mr. Jeff Hughes.

Q. Do you recall about what time of day this was? A. Approximately 7:15 to 7:30 p.m.

Q. And what reason, if any, can you give us for you and Mr. Hughes to go and see Mr. Walker? A. Well, the only reason Mr. Hughes was there with me was because he knew where Mr. Walker lived, and I didn't. He carried me down there, and—

Q. Why did you want to go see Mr. Walker? Why were you there? A. I wanted to talk to him about why he had gone back to work.

Q. As far as you were concerned, what business was it of yours? [1128] A. Because before the strike, I was a Union Steward, and Mr. Walker had questioned me on several different occasions before the strike about when his probationary period would be up so he could join the Union.

Q. Well, what did that have to do with your seeing Mr. Walker? A. I wanted to find out why he had gone back to work after he had joined the Union.

Q. As best you can remember or recall for us, will you tell us what you had to say, what Mr. Hughes had to say, what Mr. Walker had to say on this occasion, about 7, 7:15, whenever it was in the evening? A. Well, we went to Mr. Walker's home in Woodbury, went up on the front porch, and I knocked on the door. He came to the door and saw who it was. He asked me how I was doing. I asked him how he was doing, back and forth, you know.

And I asked him why he had gone back to work, and he told me he needed the money. I told him that he didn't need the money any more than anybody else did, you know, and he explained to me about his wife being pregnant and that he had just bought his house and everything. And I told him that he didn't need it—He wasn't in any worse shape than I was, that I just had built a new house and moved into it, just about six months prior to that.

Q. Did Mr. Walker have anything further to say? Did you [1129] have anything further to say? Did Mr. Hughes have anything to say? A. I asked him why he had gone back to work, and, like I said, he said he wanted the money; he needed the money, you know.

And I explained to him, by him going back to work while we were all out on strike, that it would be affecting a lot more people than just him.

And Mr. Hughes told him that he was messing with a lot of peoples' money, lot of other peoples' money. I told him I was down there to find out—I thought maybe the Company had bribed him to go back to work, or what have you, because we had heard rumors of that going on, and I wanted to find out if there was anything to it.

Q. Did Mr. Walker respond? Did you have anything further to say? Did Mr. Hughes have anything further to say? A. Mr. Walker didn't make a comment on anything of the Company having anything to do with it. He didn't mention a bribe. He didn't make any comment at all on that.

Q. Please continue. What else happened and was said? A. After he said that, he asked me did we come down there to threaten him.

Q. Did you answer him? A. I said, "No, William, there's nobody down here to threaten you. I just want to find out what's going on." And [1130] Mr. Hughes didn't make any remarks on that.

And when Mr. Hughes said something about—prior to that, when we was talking about the money, and Jeff told him he was messing with—I believe he said he was messing with a lot of other peoples' damn money, Mr. Walker said something about his wife or his daughter or somebody, his kids or something,—I don't know his exact words.—might hear him.

Mr. Hughes apologized to him for saying damn, and that was about the extent of Mr. Hughes' conversation.

Q. Did you and Mr. Walker continue the conversation after that? A. Well, after he had asked me did we come down there to threaten him, he told me that if

anything happened to his property, his home, any of his family, that there would be a law suit.

And I told him, I said, "Well, you know, didn't nobody come down here to threaten you. I ain't threatening you. I ain't going to bother your family or nothing else, but if you feel like you have to get a law suit, you just do what you've got to do", you know.

Q. Did Mr. Walker have anything else to say? Did you have anything else to say? Did Mr. Hughes have anything else to say, as best you can remember? A. Mr. Walker told me he thought it was time we left his [1131] property. So, I told him okay, and Mr. Hughes had already walked off of the porch and started down the sidewalk, and I told him okay, and I started down—started off of the steps.

At this time—I hadn't said anything else. I told him that if he went on back to work, he may be doing it at his own risk, that I wasn't going to hurt him, and Jeff wasn't going to hurt him, but I didn't know what the other people might do.

Q. All right. Anything else, sir? A. And with that, Mr. Walker unlocked his door and about halfway stepped around his door, you know, put one foot out on the porch, one foot still in his doorway, and said, "I want y'all to get off my property."

Mr. Hughes was already in the truck by then, and I was standing on the sidewalk. I told him, I said, "Now, William, this sidewalk belongs to the City of Woodbury. If you want me moved off of the sidewalk, you're going to have to move me."

And that was it. We left then.

Q. All right. A. Nothing else was said.

Q. Now, before you and Mr. Hughes arrived to speak with Mr. Walker, would you describe what you had been doing? A. We had been at a Union meeting right there



at the plant [1132] site, right there at Georgia Kraft where we had the tent set up outside the railroad.

Q. Did you have anything to drink that evening, as best you can remember, before you spoke to Mr. Walker?

A. I hadn't had a drop; no sir.

Q. What about Mr. Hughes? A. Mr. Hughes, in my presence, had drunk about a half a beer, about half of one Miller Beer, because he had it—He had left it in the truck while the Union meeting was going on, and he finished drinking that going towards Woodbury.

Q. Were you weaving back and forth at the time when you were speaking with Mr. Walker? A. I don't know of no reason why I would have been. I mean, I was as sober as I am right now.

Q. But were you weaving? A. No, sir.

Q. What about Mr. Hughes? Was he? A. Not to my recollection, he wasn't.

Q. Did either you or Mr. Hughes have any problem navigating the steps, where you kind of tripped or stumbled or something like that, either going up to his house or leaving his house? A. No, sir.

Q. Other than the word "damn", do you remember any other words that we might call as curse words being used, either by [1133] Mr. Walker, yourself, or Mr. Hughes? A. No, sir, I don't.

Q. While you are speaking with Mr. Walker, is his door opened or closed? A. His main door there had a big plate glass window in it, and it was open, but his screen door was closed and locked.

Q. Did it stay that way except for the time when you have told us that he opened it and put one foot outside of it, while you are speaking with him? A. Yes, sir, it did.

MR. LEVY: I pass the Witness.

JUDGE GROSSMAN: Cross-examination?

MR. RAUDABAUGH: May we have the statement?

MR. LEVY: Four pages. (Presenting document to Mr. Raudabaugh.)

JUDGE GROSSMAN: Two minutes, did you say?

MR. RAUDABAUGH: A few minutes to read four pages.

JUDGE GROSSMAN: Off the record.

(Off the record.)

JUDGE GROSSMAN: On the record.

(Filed November 14, 1983)

SUPREME COURT OF THE UNITED STATES

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No. 83-103

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Woodkraft Division, Georgia Kraft Company,  
Petitioner,

vs.

National Labor Relations Board

---

ORDER ALLOWING CERTIORARI.

Filed November 14, 1983.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eleventh Circuit* is granted, limited to Question 1 presented by the petition.

# **CERTIFICATE OF SERVICE**

I, J. Roy Weathersby, do hereby certify that I have this day served the within and foregoing Joint Appendix by mailing three copies thereof in envelopes properly stamped and addressed as follows:

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This ..... day of December, 1983.

J. Roy WEATHERSBY

OCT 18 1983

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

ALEXANDER L. STEVAS,  
CLERK

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION

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### **QUESTIONS PRESENTED**

1. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by refusing to execute a contract embodying the agreement reached by petitioner and the Union.

2. Whether the Board reasonably determined that employees Bishop, Hughes, and Barlow did not engage in such serious strike misconduct as to render them unfit for further employment by petitioner.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-103

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT*

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION**

---

## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 696 F.2d 931. The Board's decision and order (Pet. App. A25-A80) is reported at 258 N.L.R.B. 908.

## **JURISDICTION**

The judgment of the court of appeals was entered on January 24, 1983. A petition for rehearing and suggestion for rehearing en banc was denied on April 8, 1983 (Pet. App. A23-A24). The petition for a writ of certiorari was filed on July 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



## STATEMENT

1. On September 11, 1979, petitioner and the International Laborers Union, Local No. 246, began negotiations for a collective bargaining agreement to replace the previous contract, which was to expire on October 31. The Union was represented by Business Agent Charles Barnes and, at two sessions, by Laborers International Regional Manager Howard Henson. Petitioner was represented by Director of Labor Relations Broughton Kelly. Pet. App. A26-A27, A51.

Having failed to reach an agreement by October 31, petitioner and the Union extended the existing contract until November 15. When no agreement had been reached by that date, all bargaining unit employees went on strike and established a picket line outside the plant (Pet. App. A27 n.2, A51).

Negotiations continued during the strike. On November 27, the parties met and reached agreement on some provisions, but remained apart on several major issues, including wages, seniority, departmental point systems, and lines of progression. At a meeting on December 3, petitioner put forth an amended proposal concerning seniority, departmental point systems, and lines of progression. Pet. App. A27. At the end of the December 3 meeting, petitioner's representative Kelly handed Henson, representing the Union, a list of striking employees whom petitioner planned to discipline for strike misconduct. As Kelly later acknowledged (Pet. App. A32), his purpose was merely to "get on the record" petitioner's view that discipline was warranted in the case of certain strikers. Kelly did not request negotiations on the subject of strike discipline, and Henson declined to discuss the matter, stating that it was between

the local union and petitioner. Pet. App. A27-A28, A31-A32, A52.<sup>1</sup>

On December 9, the Union's negotiating committee voted to accept petitioner's proposals on all unsettled contract provisions, and sent petitioner a telegram stating (Pet. App. A27-A28, A52):

This is to advise you that the last company offer presented on December 3, 1979, has been accepted as a final and binding contract. All employees who could be contacted will return back to work on their regularly assigned shifts effective December 10, 1979[.] We are prepared to meet at your convenience to sign the agreement.

Two days later, however, Kelly notified the Union that several matters had to be resolved before an agreement could be made final. On the same day, Barnes wrote to Kelly requesting a meeting to arrive at final contract language so that the agreement could be signed. Pet. App. A52-A53.

When the parties next met, on December 19, petitioner gave the Union a "Memorandum of Agreement," containing proposals agreed to by the Union on December 9.<sup>2</sup> The memorandum also contained two strike-related proposals, not previously discussed, concerning the Union's acquiescence in the discharge of 25 strikers. Barnes reiterated the Union's agreement to the contractual provisions contained in the memorandum, but refused to sign the document

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<sup>1</sup>Because he was not a local union official, Henson's authority was limited to conveying the Union's position on various issues to petitioner and carrying back to the Union any proposal submitted by petitioner. Thus, upon receiving petitioner's proposals, Henson simply stated that he would present them to the negotiating committee. Pet. App. A31-A32.

<sup>2</sup>A federal mediator participated in the December 19 meeting (Pet. App. A53).

because of the inclusion of the new provisions. Pet. App. A54. Thereafter, the Union insisted that there was a collective bargaining agreement in effect, and petitioner insisted that there was not (Pet. App. A55-A56). Without any assistance from petitioner, the Union prepared a contract embodying its understanding of the contract terms, and delivered it to petitioner on July 11, 1980 (Pet. App. A56).

2. Meanwhile, on December 10, 1979, a number of formerly striking employees reported to the plant; but 25 of the strikers, including Landis Bishop, Jeffrey Hughes, and Preston Barlow, were discharged for strike misconduct (Pet. App. A62-A64).

Bishop and Hughes were discharged for their conduct during a visit to the home of non-striker William Walker. In the presence of Walker's pregnant wife and six year-old daughter, Bishop and Hughes, who had been drinking, asked Walker why he had returned to work and why he was not on the picket line. Walker, who was a probationary employee and had previously applied for membership in the Union, replied that he needed the money. Bishop and Hughes told Walker that he was "screwing them out of their . . . damn money." Bishop then said that if Walker returned to the plant Bishop would "take care of [him]." When Walker asked Bishop what he meant, Bishop started laughing and Hughes repeated the remark. During the exchange, Bishop and Hughes remained outside the house, talking to Walker through a closed screen door. Pet. App. A40, A66.

Barlow was discharged for making offensive comments about one of petitioner's supervisors. As Industrial Relations Manager Barbara Lawler drove through the picket line on her way to the plant, she heard Barlow refer to her as "that f----- bitch," and as "that mother f-----, that ugly bitch" (Pet. App. A67). On another occasion, Barlow again called Lawler a "bitch" (Pet. App. A41, A67).

3. The Board found that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to execute a contract embodying the agreement reached on December 9 (Pet. App. A39). In so holding, the Board found, contrary to the administrative law judge (ALJ), that petitioner did not raise striker discipline as a bargainable issue at the meeting on December 3, nor did petitioner make it a condition to agreement on the contract (Pet. App. A32-A33). The Board explained (Pet. App. A32; footnote omitted):

As is clear from the evidence presented by both parties, [petitioner] did not, at this juncture in the negotiations, present the issue of discipline of certain strikers as a proposal to be considered in conjunction with any of the then outstanding contractual issues. Thus, Kelly admitted under examination by counsel for the General Counsel that he did not inform Henson that he wished to negotiate or bargain about the list of strikers; and on direct examination Kelly revealed that his purpose was merely to "get on record" with the Union by letting its representative know that [petitioner] considered that form of discipline to be appropriate with respect to certain striking employees. Accordingly, the discussion on December 3 with respect to the issue of striker discipline, did not, under the circumstances herein, signify a change in [petitioner's] "bottom line" as to what it considered necessary to reach agreement on a contract.

The Board concluded that by December 9 petitioner had made specific contract proposals on all outstanding contractual issues and that the Union "capitulated on all outstanding issues" on that date (Pet. App. A35-A36). The Board further concluded that petitioner's subsequent refusal to acknowledge that agreement and its refusal to assist the Union in reducing the agreement to writing, rather than

signifying a failure to reach agreement, constituted an unlawful "obstruction and frustration of the bargaining process after agreement was reached" (Pet. App. A39).

The Board also found, in disagreement with the ALJ, that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging striking employees Bishop, Hughes, and Barlow (Pet. App. A40, A42). The Board concluded that "the statements made by the strikers Bishop and Hughes were ambiguous, and did not evidence a purpose to inflict physical harm or engage in any other foul play" (Pet. App. A40-A41 n.11). It concluded that "the actions of Bishop and Hughes constitute an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge" (Pet. App. A40). Similarly, the Board found that Barlow's conduct was "not sufficiently egregious" to warrant discharge, noting that his misconduct occurred on the picket line and that, " 'absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language' . . ." (Pet. App. A42, quoting *Coronet Casuals, Inc.*, 207 N.L.R.B. 304 (1973)).

4. The court of appeals upheld the Board's findings and enforced its order.

The court found that substantial evidence supported the Board's finding that the parties had reached agreement on a new contract (Pet. App. A14-A18). Agreeing with the Board that the striker discipline issue was not raised by petitioner as a bargainable issue, the court stated that "[a]t no point during negotiations did the Company indicate that a new contract was contingent upon resolution of this issue. \* \* \* [T]he uncontroverted evidence reflects that the Company's purpose in raising the matter was to give the Union notice of its proposed action" (Pet. App. A15; footnote

omitted). The court further agreed with the Board that "as of December 9, all contractual provisions were the subject of specific proposals and had not been withdrawn prior to the Union's December 9 acceptance" (Pet. App. A16-A17), and that the Union's capitulation to petitioner's position on that date created a binding contract (Pet. App. A16). Concerning petitioner's contention that no agreement on an effective date of the contract was reached, the court stated that "neither the Company nor the Union sought to disrupt the continuity between the existing contract and the new one" (Pet. App. A17).

Finally, rejecting petitioner's contention that discrepancies in the document prepared by the Union showed that no agreement had been reached, the court stated (Pet. App. A18):

The Board has not required the Company to execute the Union's document, but rather a contract embodying the agreement reached between the parties on December 9. The Company is therefore required only to execute an agreement that accurately reflects the most recent proposals accepted by the Union in its December 9 telegram. The Board found discrepancies in the Union's document resulting not from lack of agreement, but due to the Company's refusal to assist the Union in reducing the agreement to writing prior to the resolution of the strike-related issue. We find no error in this ruling.

Relying on the "particular circumstances of this case," the court also upheld the Board's decision that "Bishop and Hughes' verbal threats were not sufficient to justify their termination from employment" (Pet. App. A20),<sup>3</sup> and that

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<sup>3</sup>Judge Clark dissented from this portion of the court's holding (Pet. App. A22).

Barlow's remarks "did not warrant his termination" (Pet. App. A21).

### ARGUMENT

1. Petitioner contends (Pet. 17-19) that the Board improperly ordered it to adhere to contract terms to which it did not agree, in violation of this Court's decisions in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), and *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). However, as petitioner concedes (Pet. 21), resolution of this issue turns on whether substantial evidence supports the Board's finding, upheld by the court of appeals, that the parties did reach agreement on a contract. That fact-bound issue does not warrant review by this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the record amply supports the Board's findings that the Union's acceptance, on December 9, of petitioner's outstanding offer created a binding collective bargaining agreement, and that petitioner obstructed and frustrated the bargaining process by refusing to assist the Union in reducing the parties' collective bargaining agreement to writing. Petitioner's principal contention (Pet. 18-19)<sup>4</sup> is that the court exceeded its authority by "supply[ing]

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<sup>4</sup>Petitioner also suggests, without elaboration, that "the written proposals did not contain \* \* \* [a term specifying] duration, a date when wages would go into effect for each subsequent year of the contract and wage rates applicable to employees who would be temporarily assigned to higher paying jobs" (Pet. 19). Petitioner does not claim that these matters were at issue in the negotiations. The Board found that "all outstanding contractual issues" had been made the subject of specific proposals by December 9 and accepted by the Union (Pet. App. A35-A36). In large part, petitioner's ability to raise additional issues at this stage stems from its own disorganized mode of bargaining, which, as the Board observed (Pet. App. A36), "has made reconstruction of the events somewhat difficult, but not impossible." Petitioner had the opportunity in its "Memorandum of Agreement" of December 19 to clarify the issues, and the only area of contention raised by the Union was the discharge question, which had not previously been a subject of



a missing term" —i.e., an effective date — to the contract. However, the Board, affirmed by the court, simply concluded that the parties had impliedly agreed to an effective date of November 15, 1979. Substantial evidence supports this conclusion. As the Board stated (Pet. App. A34-A35), "the record reflects that the old contract expired on October 31, and that, throughout negotiations, neither side had articulated any proposal that would break the continuity between the expired contract and the new one. Indeed, that [petitioner] contemplated no such hiatus is obvious from its December 19 'Memorandum of Agreement' which calls for an effective date of November 1."<sup>5</sup> That the parties did not execute a written document including the effective date does not affect this conclusion. The negotiations were conducted throughout without any written, integrated contract proposals (Pet. App. A6 n.1), and petitioner does not deny that agreement had been reached on other contract issues, similarly agreed to without being embodied in an integrated document.

Petitioner's reliance (Pet. 19) on *NLRB v. Downs-Clark, Inc.*, 479 F.2d 546 (5th Cir. 1973), is misplaced. There the court found that there had been no meeting of the minds on wages, merit increases, or termination date. *Id.* at 548. Here, by contrast, the Board found that there was agreement on all material terms of the contract.

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negotiation. Petitioner cannot now contend that the absence of unmentioned and unbargained-for provisions precludes the possibility of a contract.

<sup>5</sup>The old contract was extended by agreement of the parties from November 1 to November 15; thus the court reasonably concluded that the intended effective date of the new agreement was November 15 rather than the earlier date included in the Memorandum of Agreement (Pet. App. A17-A18 n.8).



Nor is there merit to petitioner's assertion (Pet. 19-21) that discrepancies between the agreement and the contract drafted by the Union in July, some seven months after the Union's acceptance, reflect a lack of agreement on material contractual provisions. As the Board found, any deviation from the proposals submitted by petitioner and agreed to by the Union on December 9 "is not indicative of a lack of agreement between the parties, but is rather the result of [petitioner]'s own refusal to acknowledge the existence of an agreement, as well as its refusal to assist the Union in reducing the agreement to writing" (Pet. App. A38-A39). Accordingly, as noted by the court (Pet. App. A18), the Board's order does not require petitioner to execute the July 11 document; petitioner is required only to execute a contract that accurately reflects its final offers, as accepted by the Union on December 9.<sup>6</sup>

2. Although an employer is not required to reinstate economic strikers after they return to work if it can demonstrate that they engaged in serious misconduct during the strike (*Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977)), the Board has considerable discretion in determining when misconduct is not so serious as to permit the strikers to be discharged. *Id.* at 1336; see *North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 181 (3d Cir. 1981); *NLRB v. Terry Coach Industries, Inc.*, 411 F.2d 612 (9th Cir. 1969); cf. *Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) (right of free speech on the picket line "cannot be denied" on the basis of "a trivial rough incident or a moment of animal

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<sup>6</sup>Petitioner is obligated to assist the Union in drafting a contract accurately reflecting the December 9 agreement. In so doing, petitioner can ensure that inconsistencies between its proposals and the Union's draft of the parties' agreement are avoided.

exuberance"). Such judgments by the Board are necessary lest the employer's ability to discharge strikers on the pretext of minor disturbances render "the rights afforded to employees by the Act \* \* \* illusory." *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939), cert. denied, 310 U.S. 655 (1940). The court correctly upheld the Board's conclusion that petitioner's discharge of Hughes, Bishop, and Barlow was unjustified. Further review by this Court is unwarranted. *Universal Camera Corp. v. NLRB*, 340 U.S. at 490-491.

a. *Hughes and Bishop*

The verbal formulations adopted by the courts for evaluating the seriousness of striker misconduct differ, as petitioner points out (Pet. 8). Compare *Associated Grocers of New England*, and *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977), with the decision below (Pet. App. A20); see also *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982) (noting the differences in formulation but finding it unnecessary to resolve them). But the holdings in these cases can as easily be attributed to variations in the factual circumstances as to any variations in the legal standards employed. Tested against the fact patterns of those cases, the Board's decision in this case is well within its discretion.

In *McQuaide*, the court upheld the Board's determination that one employee, whose conduct approximated that of Bishop and Hughes, was improperly discharged. The employee, Geisel, remarked to a non-striker who had escaped injury when a rock was thrown through the windshield of a truck, "Maybe next time you won't be so lucky." 552 F.2d at 526. The court agreed that Geisel's statement was too ambiguous to constitute serious misconduct (*id.* at 528). By contrast, the court found the conduct of another employee, Lavelly, too egregious to countenance. Lavelly followed a non-striker to a delivery point and said that

"we'll get you"; shook his fist at another truckdriver and said that he would "knock the g-- d--- s--- out of [him]" if he drove again; and told another truckdriver, "Scab, you're going to get yours" and partially blocked his egress (*id.* at 526-527, 528). Lavelly thus engaged in more than one isolated incident and his remarks were accompanied by physical acts and gestures which heightened their effect; the strike, moreover, was "marked by incidents of vandalism and harassment" (*id.* at 528). On these bases — entirely unlike the instant case — the court concluded that Lavelly's discharge was permissible.

Similarly, in *Associated Grocers of New England*, the First Circuit remanded to the Board for reconsideration the issue of the discharge of a striker, Paquette, who had informed a neighbor that to apply for a job at the truck facility might cause "repercussions," as strikebreakers historically had been retaliated against (562 F.2d at 1337). On remand the Board, applying the *McQuaide* test, found that Paquette's statements "did not have a tendency to coerce or intimidate." *Associated Grocers of New England, Inc.*, 238 N.L.R.B. 871, 872 (1978). By contrast, the *Associated Grocers* court also found that other strikers, Bourgeois, Samsom, and Moreau, had engaged in conduct so egregious as to deny them a right to reinstatement. Bourgeois threatened the lives of job applicants in the presence of 40-50 pickets. The applicants were so frightened that they did not enter the plant to complete the applications. Samsom and Moreau followed a supervisor down a lonely, dark road late at night and temporarily blocked his egress from a dead end road. 562 F.2d at 1336-1337.

Finally, in *Midwest Solvents* the court agreed with the Board that striker Donald Lassen, who went to a non-striking employee's apartment, urged him not to work, and warned him to " 'watch' himself, that 'some of the boys

might get rowdy' " (696 F.2d at 766), had not engaged in misconduct sufficiently serious to justify discharge.

The decision below is consistent with these precedents.<sup>7</sup> Much like the workers whose discharges were overturned in *McQuaide*, *Associated Grocers*, and *Midwest Solvent*, Bishop and Hughes engaged in no violent acts or gestures. The surrounding circumstances of the strike, though not harmonious, did not involve threats or injuries to non-strikers. Rather, the evidence was consistent with a conclusion that Bishop and Hughes simply acted impulsively, after a night of drinking. And as the Board noted, their statements to Walker were "ambiguous, and did not evidence a purpose to inflict physical harm or engage in any other foul play" (Pet. App. A40-A41 n.11).

In determining whether strike misconduct deprives the employee of the Act's protection, the Board assesses "each incident of alleged misconduct \* \* \* in light of the surrounding circumstances, including the severity and frequency of the involved employee's actions." *Limestone Apparel Corp.*, 255 N.L.R.B. 722, 739 (1981); see *George Banta Co.*, 256 N.L.R.B. 1197, 1224 (1981), enforced, 686 F.2d 10 (D.C. Cir. 1982), cert. denied, No. 82-1162 (Apr. 18, 1983). Applying these principles, and those of the cases cited by petitioner and discussed above, the court below was correct in upholding the Board's determination that "the actions of Bishop and Hughes constituted an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge" (Pet. App. A40). Any resolution of the

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<sup>7</sup>Petitioner's reliance on *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978), is also misplaced. In *Moore Business Forms*, which involved "continuing, pervasive violence" in connection with a strike (*id.* at 839), the court upheld the reinstatement of a number of employees (*id.* at 843), reversing the Board's order of reinstatement in seven individual cases of egregious conduct, all of them more extreme than the conduct of Bishop and Hughes in this case. See *id.* at 843-846.

differences between the circuits on the test to be applied to strike misconduct cases should await a case, unlike this one, in which the outcome hinges on the difference in the test rather than on the facts.

b. *Barlow*

The court of appeals applied settled principles of law when it sustained the Board's decision that Barlow's crude remarks to Industrial Relations Manager Lawler were not serious enough to justify discharge. See *McQuaide*, 552 F.2d at 528 ("the use of epithets, vulgar words or profanity does not deprive a striker of the protection of the Act"); *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970) ("passions run high in labor disputes and \* \* \* epithets and accusations are commonplace"); see also *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 60-61 (1966); *Associated Grocers of New England*, 562 F.2d at 1335.

Petitioner's reliance (Pet. 16) on *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), is misplaced. There, the Court held that massed name-calling by large groups of striking employees, which was calculated and likely to provoke violence, could be enjoined by a state court. There is no issue here of the right of petitioner to invoke the aid of a state court to prevent violent conduct by striking employees. Nor does petitioner cite any authority for its assertion (Pet. 16) that "rarely could language such as used by Mr. Barlow be used by strikers against non-strikers without provoking violence." It did not provoke violence here, nor can it be considered unusual in the heated context of labor disputes.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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**OCTOBER 1983**

DEC 29 1983

ALEXANDER L. STEVENS

No. 83-103

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**In the Supreme Court of the United States**

**October Term, 1983**

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**WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,**

*Petitioner,*

**vs.**

**NATIONAL LABOR RELATIONS BOARD and  
LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, AFL-CIO, LOCAL 246,**

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT**

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**BRIEF FOR PETITIONER**

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**Petition for Certiorari Filed July 7, 1983**

**Certiorari Granted November 14, 1983**

## **QUESTION PRESENTED**

Whether Section 7 of the National Labor Relations Act Gives Striking Employees the Right to Threaten and Intimidate Nonstriking Employees.



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No. 83-103

**In the Supreme Court of the United States**

**October Term, 1983**

---

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD and  
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NORTH AMERICA, AFL-CIO, LOCAL 246,  
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

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**BRIEF FOR PETITIONER**

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 696 F.2d 931 (11th Cir. 1983). This opinion appears in the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed in this Court on July 7, 1983 at pages A1-A22.

The Decision and Order of the National Labor Relations Board ("Board") and the Decision of the Administrative Law Judge ("ALJ") are reported at 258 N.L.R.B. 908 (1981). The Board's decision appears in the printed Appendix to the Petition for Writ of Certiorari at A25-A47. The ALJ's decision appears in the Joint Appendix to the briefs on the merits filed with this Court on December 29, 1983 at JA 15-93.

### **JURISDICTION**

The judgment of the Court of Appeals was entered on January 24, 1983. The petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 8, 1983. The Petition for Writ of Certiorari was filed on July 7, 1983. This Court granted the petition on November 14, 1983 limited to Question 1 presented by the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **STATUTE INVOLVED**

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 ("Section 7"), provides:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

## STATEMENT OF THE CASE

Woodkraft Division/Georgia Kraft Company ("Georgia Kraft" or "Company") appeals the Eleventh Circuit Court of Appeals' enforcement of a back pay order of the National Labor Relations Board ("Board") based on a finding that the Company violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. ("Act") when it discharged employees Landis Bishop and Jeffrey Hughes for strike misconduct. The misconduct occurred during an economic strike called by the Laborers' International Union of North America, AFL-CIO, Local 249 ("Union") in the Fall of 1979.

When the Company refused to reinstate Bishop and Hughes<sup>1</sup> after the strike, the Union filed charges against the Company alleging violations of Sections 8(a)(1) and 8(a)(3) of the Act. [JA 3, 4].<sup>2</sup> The 8(a)(3) allegations against the Company were dismissed since the ALJ found that concern for misconduct rather than anti-union animus was the motivating force in the Company's action. [JA 75]. The ALJ supported this conclusion by noting that, except for the alleged discriminatees, the Company immediately reinstated all the other strikers with no disciplinary action. [JA 44, 73]. He found a dearth of anti-union statements [JA 74], and noted that the Company

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1. Twenty-eight [JA 5] employees were named as discriminatees in the original Complaint. Both the Board and the ALJ upheld the discharge of three of these employees. The Board found that the discharges of the remaining employees violated § 8(a)(1) of the Act, imposed traditional remedies for these violations and dismissed the § 8(a)(3) charges because of no discriminatory motive on the part of the Company. This appeal involves two discharges that the ALJ upheld and the Board reversed.

2. "JA" refers to the Joint Appendix to the briefs on the merits.



was quite scrupulous in its observance of employee rights. [JA 74]. Finally, he found that it was quite clear that serious misconduct did occur culminating in a state court injunction. [JA 75].

An administrative hearing was held in July, 1980. The Administrative Law Judge ("ALJ") found that the Company did not violate the Act in discharging Bishop and Hughes because their actions were of sufficient gravity to warrant such discipline. [JA 77, 80]. He credited non-striker William Walker's testimony that Bishop and Hughes came to his home at night. They were drunk and cursing him. They told him he was "screwing them out of their G.... damn money by working during the strike." Bishop said he would "take care of him [Walker]" if he returned to work during the strike. [JA 63, 93-96]. This statement was repeated by Hughes [JA 63, 96]. Hughes called Walker a "sorry mother f.....er." [JA 63, 96]. These comments were made on Walker's front porch and in the presence of his young daughter and pregnant wife. [JA 63, 77, 95, 96].

The ALJ upheld the discharges finding, that "Bishop and Hughes . . . *threatened him with bodily injury if he returned to work.*" [JA 63, 77, emphasis added].

The Board accepted the ALJ's credited testimony but found that the actions of Bishop and Hughes constituted an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge [A40].<sup>3</sup> The Board concluded that the remark about "taking care of" Walker was ambiguous, and that it was unaccompanied by violence or physical gestures. [A40].

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3. "A" refers to the Appendix to the Petition for Writ of Certiorari.

A divided panel of the Eleventh Circuit issued its decision on January 24, 1983 granting enforcement of the Board's order. [A22]. The Eleventh Circuit also adopted the Board's standard that verbal threats are protected by Section 7 of the Act if not accompanied by physical acts or gestures. [A20]. The dissenting judge, in line with the other Circuit Courts of Appeals and consistent with well-established precedent of the Eleventh Circuit, refused "to join in sanctioning strike-related conduct that generates fear in a person when he is standing in the door of his home." [A21].

The Eleventh Circuit denied the petitioner's request for rehearing and suggestion for rehearing en banc on April 8, 1983. [A23-24].

This Court granted the Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit on November 14, 1983. [JA 103].

### **SUMMARY OF ARGUMENT**

The actions of Landis Bishop and Jeffrey Hughes in making a nighttime visit to the home of a nonstriking employee, swearing at him in front of his pregnant wife and young daughter and threatening to "take care of" him are not protected by Section 7 of the Act and are sufficiently egregious to warrant discipline. The Company did not violate § 8(a)(1) of the Act by discharging Bishop and Hughes for this indefensible conduct. The Company urges this Court to overrule the Eleventh Circuit Court of Appeals and deny enforcement of the back pay order.

The Board held and the Eleventh Circuit affirmed that an employer cannot discharge a striker for engaging in threats unless the threats are accompanied by physical

acts or gestures. This "overt act" test should be rejected.<sup>4</sup> The Third and First Circuit Courts of Appeals have discarded the Board's rule for the simple reason that threats are not protected by the Act. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3rd Cir. 1977). This Court should adopt the "objective test" propounded by the Third and First Circuit Courts and hold that threats alone which reasonably tend to coerce or intimidate employees in the rights guaranteed under the Act are not protected.

The Board's overt act standard should also be rejected because it ignores the Section 7 rights of nonstriking employees. The statute's plain language and legislative history support the conclusion that Congress intended to protect the right to refrain from engaging in concerted activities as well as the right to participate in such actions. By ordering reinstatement for strikers who threaten and intimidate nonstrikers, the Board fails to balance the equally protected rights of nonstrikers to be free from intimidation and coercion in exercising their rights to refrain from strike-related activities. This Court should reject the Board's overt act test for evaluating threats and rule that an employer does not violate Section 8(a)(1) of the Act when it discharges striking employees who threaten and intimidate nonstriking employees. Under any standard, this Court should at least draw the line on threats and intimidation away from the picket line and at employees' homes.

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4. Although the Board's judgment is entitled to deference in matters of federal labor policy and employee relations, it does not require any special expertise to identify and evaluate threats and intimidating statements. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

## ARGUMENT

### **I. STRIKING EMPLOYEES ARE NOT PROTECTED BY SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT WHEN THEY THREATEN AND INTIMIDATE NONSTRIKING EMPLOYEES AND THEY LOSE THEIR REINSTATEMENT RIGHTS BY ENGAGING IN SUCH INDEFENSIBLE CONDUCT.**

#### **A. Section 7 Does Not Protect All Strike-Related Activities.**

There is no question that the Act guarantees employees the right to lawfully organize and strike. 29 U.S.C. §§ 157 and 163. In addition Sections 8(a)(1) and 8(a)(3) of the Act make it an unfair labor practice for an employer to interfere with the exercise of these rights. To ensure that employees will not be discouraged in exercising their right to strike, an employer must reinstate employees who have engaged in an economic strike, unless they have been permanently replaced or there is a legitimate and substantial business justification. *NLRB v. Fleetwood Trailer Company*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf.* 414 F.2d 99 (7th Cir. 1969), *cert. den.* 397 U.S. 920 (1970). Despite these rights, employers may be justified in refusing to reinstate striking employees who engage in a variety of strike misconduct such as coercive or threatening acts. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763, 765 (10th Cir. 1982); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977); *Advance Industries Division-Overhead Door Corporation v. NLRB*, 540 F.2d 878, 882 (7th Cir. 1976); *NLRB v. Pepsi Cola*, 496 F.2d 226 (4th Cir. 1974).

Not all forms of conduct which fall literally within the terms of Sections 7 and 13 are entitled to statutory protection. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *Coronet Casuals, Inc.*, 207 NLRB 304 (1973). In deference to the rights of employers and the public, the Board and Courts agree that an employee who engages in serious misconduct during the economic strike gives up his right to reinstatement. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1983); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *W. J. Rusco Company v. NLRB*, 406 F.2d 725 (6th Cir. 1969); *Hedstrom Company*, 235 NLRB 1198 (1978); 29 USC § 160(c); Erickson, *Forfeiture of Reinstatement Rights Through Strike Misconduct*, 31 Lab. L. Journal 602 (October, 1980). On the other hand, the Board and the Courts recognize that not every act of impropriety committed in the course of a strike deprives an employee of the Act's protection. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *Arrow Industries, Inc.*, 245 NLRB 1376 (1979); *M. P. Industries, Inc.*, 227 NLRB 1709 (1977); *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975).

In reviewing strike misconduct cases, the Board refers to various, albeit related standards, for specific types of misconduct. When the misconduct involves threats to nonstriking employees, the test generally followed by the Board is that an employer is not entitled to discharge a striker for threats unless the threats are accompanied by physical acts or gestures. See, *A. Duie Pyle, Inc.*, 263 NLRB 744 (1982); *Arrow Industries, Inc.*, 245 NLRB 1376 (1979); *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975); *Valley Oil Company*, 210 NLRB 370 (1974); *Capitol Rubber and Specialty Company*, 201 NLRB 715 (1973); Cabot & Jarin, *The Third Circuit's New Standard For Strike Mis-*

conduct Discharges: *NLRB v. W. C. McQuaide, Inc.*, 23 Vill. L. Rev. 645 (1977-78).

The Third and First Circuit Courts have expressly rejected the Board's test that overt acts are needed in addition to the threats. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977). The Eleventh Circuit is the first Court to accept the Board's overt act test which has created a conflict among the Circuits.

The question presented to this Court is whether Section 7 of the Act gives striking employees the right to threaten and intimidate nonstriking employees. More specifically, the issue is whether the Board under any standard should be allowed to protect profane threats by intoxicated strikers made at the homes of nonstriking employees in front of their families.

**B. The Board's Test for Evaluating Threats by Striking Employees Should Be Rejected Because It Is Erroneous As a Matter of Law.**

In the case before this Court, the ALJ denied reinstatement to Landis Bishop and Jeffrey Hughes after finding that the two intoxicated strikers made a nighttime visit to the home of a nonstriking employee, William Walker, swore at him and threatened him with bodily injury in the presence of his young daughter and pregnant wife. [A67]. The Board overruled the ALJ, finding the threats "to take care of" Walker to be "ambiguous" and not sufficient to warrant discharge since the threats were unaccompanied by physical acts or gestures. [A40]. The Eleventh Circuit specifically adopted the NLRB's overt act test and enforced the Board's order. Judge Clark dissented and refused "to join in sanctioning strike-related conduct that can gen-

erate fear in a person when he is standing in the door of his home." [A22].

The Board's judgment that only those threats accompanied by physical acts or gestures lose the protection of the Act is misguided. Threats, alone, are not protected by the Act. *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3rd Cir. 1977).<sup>5</sup> The Third Circuit rejected the Board's overt act test because it stated an erroneous rule of law and held:

We recognize that some confrontations between strikers and non-strikers are inevitable and that not every impropriety is grounds for discharge. Moreover, we recognize that it is the primary responsibility of the Board and not the Courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights.' [Citations omitted.] Yet, we do not believe that the employer must countenance conduct that amounts to intimidation and threats of bodily harm. Threats are not protected conduct under the Act, and we fail to see how a threat acquires protected status simply because it is unaccompanied by physical acts or gestures. The question is whether a threat is sufficiently egregious, not whether there is added emphasis.

*NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3rd Cir. 1977).

In *McQuaide*, the ALJ found that striking employee Lavelly threatened three individuals on separate occasions.

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5. See, discussion 552 F.2d at 527. See, also, Cabot & Jarin, *The Third Circuit's New Standard for Strike Misconduct Discharges: NLRB v. W. C. McQuaide, Inc.*, 23 Vill. L. Rev. 645, 653-654 (1977-1978); Thicblot & Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB*, 326-327 (1983).

Lavelly followed nonstriker King to a delivery point and said he would "get him". Later, Lavelly shook his fists at employee Ingston as he drove across the picket line and called him a scab and said he would "knock the . . . shit out of him" if he drove any longer. In addition, Lavelly told truck driver Harris "you are going to get yours". The Board found that employee Lavelly's threats were protected since the language was not accompanied by any physical acts or gestures that would provide added emphasis or meaning to their words sufficient to warrant the finding that he should not be reinstated to his job at the strike's conclusion. *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975). In refusing to enforce the Board's reinstatement order, the Third Circuit stated that substantial evidence on the record indicated that Lavelly's conduct constituted threats which could reasonably tend to coerce or intimidate.

In rejecting the Board's test, the First Circuit also found the Board's overt act requirement to be misplaced.

The Board's formula . . . is too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity. A serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977).

The Third and First Circuits adopted the following objective standard for determining when threats and intimidation by individual strikers lose the protection of Section 7:

Whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act.



*Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 528 (3rd Cir. 1977).

In announcing this objective test, the Third Circuit noted that some Courts have used a subjective approach to evaluate threats by focusing on the effect on the victim. *NLRB v. EFCO Manufacturing Co.*, 227 F.2d 675, 676 (1st Cir. 1955), cert. denied 360 U.S. 1007 (1955); *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 846 (8th Cir. 1964). The Court noted that the difficulty with a subjective analysis is that it does not focus on the conduct of the striker. *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 at 528. The test of coercion and intimidation should not be whether the conduct proves effective. Under a subjective test, strikers could threaten with impunity so long as the victim was particularly courageous.

Other Courts have drawn the line at conduct that is intended to threaten or intimidate nonstrikers. *NLRB v. Pepsi Cola Company*, 496 F.2d 226 (4th Cir. 1974); *NLRB v. Hartmann Luggage Co.*, 453 F.2d 179 (6th Cir. 1971). The difficulty with this approach is that even threats to kill can be dismissed as mere picket line rhetoric or "animal exuberance" not literally intended.

The objective test followed by the Third and First Circuits is a reasonable and balanced approach. It provides a far more appropriate guide than the Board's overt act test or the various subjective analyses in determining whether a threat, with or without more, is sufficiently egregious to justify an employer refusing to reinstate the wrongdoer.

The error in the Board's reasoning is illustrated in *A. Duie Pyle, Inc.*, 263 NLRB 744 (1982). In *A. Duie Pyle* the Board, while acknowledging criticism by the Courts of

Appeals, continued to apply its overt act test. The ALJ found that a striking employee's obscene threats to burn down the house of a nonstriker was sufficiently serious conduct to render him unfit for future performance. In commenting on the Board's overt act requirement, the ALJ noted that a threat of arson cannot be reasonably accompanied by physical acts or gestures. The Board reversed the ALJ, flatly stating that an employer cannot discharge a striker for engaging in threats unless the threats are accompanied by physical acts or gestures. 263 NLRB at 745. The Board noted that the striking employee shouted "Givler, your house is on fire," and "if it is not now, it will be Saturday." The Board also noted that the striker repeated the first remark about Givler's house being on fire twice more within the next few minutes and called Givler a bastard. The Board stated that "we find that Touchton's picket line threat, while ill-considered *and not to be condoned*, was not sufficiently egregious to deny Touchton reinstatement." 263 NLRB at 745. (Emphasis added.) The Board is simply unwilling to recognize the contradiction in finding specific conduct not to be condoned, yet ordering the company to condone that very conduct by reinstating the employee.

Chairman Van DeWater vigorously dissented from the A. Duie Pyle holding and concluded that discharge was plainly justified. Couching his dissent in terms of the Board test, he concluded that "Touchton's threat was the coercive equivalent of the physical acts and gestures required by the Board to support the discharge of a striker for threats or verbal abuse to a nonstriker." 263 NLRB at 747. This forced construction of the Board's overt act test is not necessary to achieve a correct result. The objective test would simply acknowledge that threats alone can be intimidating and coercive.

This Court should reject the Board's overt act test and adopt the objective standard of the Third and First Circuits.<sup>6</sup> In accepting the Board's rule, the Eleventh Circuit noted that the Board is ordinarily entitled to deference in determining the scope of activity protected under Section 7 of the Act. *Georgia Kraft Co. v. NLRB*, 696 F.2d 931 (11th Cir. 1983) [A19]. This principle should not apply here since it does not take any special expertise in industrial relations to identify threatening and intimidating remarks.

<sup>6</sup> Under this objective test, it is respectfully suggested that this Court find that the actions of Landis Bishop and Jeffrey Hughes reasonably tended to coerce William Walker in the exercise of his protected rights to work during the strike and refrain from engaging in strike-related activities. As the ALJ found, under the circumstances, Mr. Walker was reasonably in fear of bodily harm and was reasonably intimidated by Mr. Hughes and Mr. Bishop. The threats to Walker were not in isolation. The ALJ found that "serious misconduct did occur" during the strike including "rather widespread acts of violence and near violence, culminating in [a] state court injunction. . . ." [JA 75]. Under any circumstances, repeatedly threatening a non-striker with bodily harm at his home at night in the presence of his wife and child is sufficiently egregious conduct to justify disciplinary action. This Court should join Judge Clark in refusing to sanction strike-related conduct that can generate fear in a person when he is standing in the door of his home.

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6. In addition, a divided panel of the Tenth Circuit Court of Appeals recently avoided adopting or rejecting the Board's test by noting that the employer's refusal to reinstate in that case would not have met the objective standards of either the Third and First Circuits either. The dissent argued that the Court should address the issue and clearly adopt the standard set forth by the First and Third Circuits. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982).

**C. The Board's Test Should Also Be Rejected Because It Fails to Recognize the Section 7 Rights of the Nonstriking Employees to Refrain From Engaging in Concerted Activities.**

In *NLRB v. Fleetwood Trailer Company*, 389 U.S. 375 (1967), this Court stated that it is the primary responsibility of the Board to strike the proper balance between the employer's asserted business justifications for refusing to reinstate strikers and the invasion of the employees' Section 7 rights to organize and strike. 389 U.S. at 378; 29 U.S.C. § 157. This Court has never addressed the question of whether the rights of nonstriking employees weigh in the balance. The Board has failed to resolve this issue. The Board has repeatedly supported threats by strikers against nonstriking employees, without considering the equal rights of nonstriking employees to be free from restraint and coercion in exercising their Section 7 rights to refrain from striking or other activities. 29 U.S.C. § 157.

The statutory language is clear. "Employees . . . shall also have the right to refrain from any or all of such activities [the right to self-organization, to form, organize, or assist labor organizations . . . and to engage in other concerted activities . . .]". 29 U.S.C. § 157.

The legislative history makes clear that the 1947 Amendments to Section 7 were offered for the sole purpose of equalizing the legal rights and responsibilities of employers, labor organizations, and employees. H. R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 318 (1948); S. Rep. No. 105, 80th Cong., 1st Sess. 1 (1947), reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 407 (1948); 93 Daily Cong. Rec. 3550, April 15, 1947; 4261, April 28,

1947; 4558, 4561, 4563, May 2, 1947, *reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 640; 1067; 1198-1199, 1203-1204, 1206, 1207 (1948).*

In the congressional debate over the 1947 amendments, Senator Ball addressed the plight of those employees wishing to refrain from participating in union activities. Senator Ball noted that employees were forced to endure visits to their homes and threats that they would be taken care of. He concluded that "It seems to me individual employees in the free exercise of their rights guaranteed by this Act are just as much entitled to protection from such activities of unions as they are from the same kind of coercive activities on the part of employers."<sup>7</sup> Both the House Committee Report and the Conference Report explained that the Section 7 Amendment would grant employees the right to refrain from joining or engaging in concerted activities with their fellow employees if they do not wish to do so.<sup>8</sup>

Senator Smith, co-sponsor of the 1947 legislation, described Section 7 as the key section in rectifying the imbalance in the original Act.<sup>9</sup> The concern for protecting the rights of employees to be able to refrain from union activities was underscored by the 1947 amendment adding Section 8(b) (1) to the Act. Complementing Section 7, Section 8(b) (1) was proposed to make it an unfair labor prac-

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7. 93 Daily Cong. Rec. 4558, May 2, 1947, *reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1199-1200 (1948).*

8. H. R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947) and H. R. Rep. No. 510, 80th Cong., 1st Sess. 40 (1947), *reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 318, 544 (1948).*

9. 93 Daily Cong. Rec. 4561, May 2, 1947, *reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1204 (1948).*

tice for a union to restrain or coerce employees in the exercise of their guaranteed Section 7 rights.<sup>10</sup> In debate, Senator Taft, sponsor of the legislation, explained that these complementary provisions were necessary "if we wish to secure the equality which the bill aims to give as between employers and employees." *Id.* Senator Taft acknowledged that unions had threatened employees. Noting that the law prohibits employers from threatening employees, Taft explained that the 1947 amendments did nothing more than bind the union in the same way. *Id.* In debating the implications of the proposed Sections 7 and 8(b)(1), Senator Taft explained that the legislation would not outlaw or limit any employee's right to strike. However,

It would outlaw threats against employees. It would not outlaw anybody's striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.<sup>11</sup>

In a supplementary analysis of the Amendments as proposed following conference debate, Senator Taft noted that the express language of Sections 7 and 8(b)(1) would prohibit "coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line."<sup>12</sup>

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10. 93 Daily Cong. Rec. 4142, April 25, 1947, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1025 (1948).

11. 93 Daily Cong. Rec. 4563, May 2, 1947, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1207.

12. 93 Daily Cong. Rec. 7000, June 12, 1947, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1623 (1948).

By allowing employees to threaten and intimidate nonstriking employees, absent physical acts or gestures the Board and the 11th Circuit proceed on the erroneous assumption that the "protection of the Act" immunizes strikers from the consequences of such indefensible activity. Because of the Board's preoccupation with protecting the right to strike and issuing reinstatement orders, it ignores the equally protected rights of nonstrikers not to engage in such activities. Consequently, the Board characterizes threats as minor misconduct, animal exuberance, or "boys will be boys." The Board's rationale is not correct since it fails to strike any balance whatsoever. Section 10(c) of the Act states that the Board cannot order reinstatement or back pay for an individual discharged for cause. 29 U.S.C. § 160(c). Although Section 10(c) does not allow an employer to discharge an employee for engaging in protected concerted activities, Congress and this Court have long recognized that Section 7 does not protect all strike-related activities:

The courts have firmly established the rule that under the existing provisions of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct.

*NLRB v. Electrical Workers*, 346 U.S. 464, 473, 474 (1953), quoting from H. R. Rep. No. 510, 80th Cong., 1st Sess. 38-39. See also, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

In *NLRB v. Washington Aluminum Company*, 370 U.S. 9 (1962), the Court identified as unprotected those activities that are "unlawful, violent or in breach of contract." 370 U.S. 9, 17 (1962). *Southern Steamship Company v. NLRB*, 316 U.S. 31 (1942); *NLRB v. Sands Manufacturing Company*, 306 U.S. 332 (1939); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).



In *NLRB v. Electrical Workers*, 346 U.S. 464 (1953), the Court denied the protection of Section 7 to activities characterized as "indefensible" because they were found to show a disloyalty to the worker's employer which this Court considered unnecessary to carry on the workers' legitimate concerted activities. *Id.* at 477; *Washington Aluminum Company v. NLRB*, 370 U.S. 9, 17 (1962). Georgia Kraft contends that threatening and intimidating nonstriking employees is indefensible and unprotected under the Act. Protecting such conduct is not necessary to effectuate the legitimate goals of striking employees.

The Court of Appeals recognize that the right of non-striking employees to continue to work is a basic right guaranteed by the Act. *See, e.g., NLRB v. Community Motor Bus Company*, 439 F.2d 965 (4th Cir. 1971). In an effort to balance the rights of striking and nonstriking employees, the Courts of Appeals have frequently held that strikers may attempt to persuade nonstrikers by proper means to join their protest, but such efforts must be confined within reasonable limits if the strikers are to be protected in their right to reinstatement to their former position. *NLRB v. Pepsi Cola*, 496 F.2d 226 (4th Cir. 1974); *W. J. Rusco Company v. NLRB*, 406 F.2d 725, 727 (6th Cir. 1969).

In *NLRB v. Pepsi Cola*, 496 F.2d 226 (4th Cir. 1974), the Court found, contrary to the Board, that a striking employee's implied threats to a prospective job seeker went beyond those reasonable limits. In that case, striking employee Taylor approached a car where a prospective job seeker and his wife were sitting, stuck his head in the window and said, "I know where you live, and if you go in there to work, I'll come looking for you." The job seeker left the premises. In refusing to condone such conduct, the Court expressly rejected the Board's assess-



ment that the threat was not of such a nature as to warrant Taylor's disqualification for reinstatement. The Court rejected the Board's apparent distinction between Taylor's threats and a specific threat of physical harm stating simply, "we cannot agree that a veiled threat is substantially different from one delivered with less subtlety." 496 F.2d at 229.

In addition to narrowly defining what constitutes an unprotected threat, when it finally finds one, the Board often distinguishes it away. As illustrated by the *Georgia Kraft* case, the Board will combine its "overt act" test with an isolated act principle to characterize threats as minor misconduct. *Georgia Kraft Company*, 228 NLRB 908, 913 (1981) [A40]. See also, *Arrow Industries, Inc.*, 245 NLRB 1376 (1979). The isolated act test is bankrupt. A single threat can restrain or coerce an employee in exercising his right to refrain from strike or union-related activities. Would Bishop and Hughes' nighttime threats to William Walker delivered at his home in front of his family have been more intimidating to Walker if they had threatened someone else first?

The Board also trivializes threats by calling them ambiguous. Fortunately, the Courts have repeatedly refused to endorse the Board's efforts. In *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971), a striking employee approached the car of a nonstriking employee as he crossed the picket line and began to curse him and told him that if he "did anything he was going to get my . . . ass." The nonstriking employee's wife and child were with him in the car. The trial examiner concluded that this was a threat of physical harm and constituted serious misconduct warranting termination. The Board rejected the trial examiner's conclusion and characterized the remark as "vague and ambiguous." In denying enforcement,

the Fifth Circuit acknowledged the circumscribed review allowed by *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) but stated, "We are unable to find substantive evidence to justify the Board's interpretation—in opposition to its Trial Examiner—of Whitehead's remarks and related activities." 449 F.2d at 512.

In *NLRB v. Moore Business Forms*, 574 F.2d 835 (1978) the Fifth Circuit again refused to enforce a Board order to reinstate a striking employee who retorted, "There's ways to keep you from it" when a nonstriking employee informed him that he was going to work. This encounter took place in the daytime at the plant site and there was no allegation that the remark was accompanied by any physical act or gestures. In refusing to enforce the Board's Order, the Fifth Circuit specifically rejected the Board's characterization of this threatening comment as "ambiguous."

In *Georgia Kraft*, Judge Hatchett distinguishes *Moore Business Forms* on the meritless ground that the record in *Georgia Kraft* shows that violent acts were only committed against property and not against persons. This after-the-fact distinction is incorrect and is little comfort to the person being threatened at home by two intoxicated strikers. In *Georgia Kraft* the ALJ found widespread acts of violence including rock throwing and pointing a gun at the plant manager. The ALJ noted the Company had a genuine problem that culminated in a state court injunction. [JA 75].

What the Board overlooked in *Georgia Kraft* is that Landis Bishop and Jeffrey Hughes were not engaged in minor acts of misconduct. Using unlawful and unprotected means, Bishop and Hughes interfered with a basic right protected by the Act—the right of a nonstriking employee to refrain from engaging in concerted activities.

In support of its decision in the *Georgia Kraft* case the Board cited yet another instance where it ignored the non-striking employee's right to refrain from concerted activities and approved a striking employee's traveling to the home of a nonstriking employee to threaten and intimidate her. *M. P. Industries, Inc.*, 227 NLRB 1709, 1710-11 (1977). In *M. P. Industries*, pickets Barrow and Walter followed strike replacement Debby Wentworth to her house. When the strikers reached Wentworth's home, Barrow and Walker told Wentworth, "You had better watch it, Debby. We know where you live." They also asked Wentworth where her father (who had been crossing the picket line and driving her to and from work) worked. After she told them where he worked, they asked if he was in a union. When she replied that she thought so, they said, "Well, that's nice to know." 227 NLRB 1709, 1711, 1717. The ALJ noted that Wentworth called the police and asked them to keep an eye on her and her house that night. 227 NLRB at 1717. The ALJ found that they intended to intimidate her, and further noted that there is no evidence that they could not have appealed to her on the picket line. He stated, "Such intimidation at the home site was serious misconduct sufficient to justify [discipline] . . . The Act does not shield them from such discipline simply because they were engaged in union activity at the time." 227 NLRB at 1717. In overruling the ALJ, the Board did not express any concern at all that the intimidation took place at an employee's home. The Board gave its usual justification that "a single isolated threat, unaccompanied by any violence, is not conduct of a sufficiently serious character as to remove an employee from the protective mantle of the Act." 227 NLRB at 1711.

The Board's overt act test is erroneous as a matter of law since it condones striking employees' threats and inti-

midation in contravention of the purposes of the Act. By requiring employers to reinstate employees who have threatened their fellow workers, the Board is not promoting industrial peace. In failing to recognize the equal rights of nonstriking employees to be free from fear and intimidation the Board's "overt act" requirement does not "fall . . . within that category of situations in which the Courts should defer to the agency's understanding of the statute which it administers". *NLRB v. Pipefitters Local 638*, 429 U.S. 507, 528 (1977). This Court should at least rule that an employer does not violate the Act when it discharges striking employees who intimidate and coerce nonstriking employees at their homes while they are exercising their equal rights to refrain from engaging in concerted activities.

# CONCLUSION

For the reasons stated, Petitioner Woodkraft Division/ Georgia Kraft Company respectfully requests this Court overrule the Decision of the Eleventh Circuit Court of Appeals concluding that the Company violated Section 8(a)(1) of the National Labor Relations Act when it refused to reinstate striking employees Landis Bishop and Jeffrey Hughes and deny enforcement of the National Labor Relations Board's Back Pay Order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, J. Roy Weathersby, do hereby certify that I have this day served the within and foregoing Brief for Petitioner by mailing three copies thereof in envelopes properly stamped and addressed as follows:

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Solicitor General  
Department of Justice - Suite 5614  
9th & Constitution Avenue, N. W.  
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William A. Lubbers, Esquire  
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1717 Pennsylvania Avenue, N. W.  
Suite 1200  
Washington, D. C. 20570

This 29th day of December, 1983.

**J. ROY WEATHERSBY**

No. 83-103

Office - Supreme Court, U.S.

**FILED**

**MAR 6 1984**

ALEXANDER L. STEVENS

CLERK

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***In the Supreme Court of the United States***

OCTOBER TERM, 1983

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WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

**MOTION TO VACATE THE JUDGMENT OF THE COURT OF  
APPEALS AND TO REMAND THE CASE TO THE NATIONAL  
LABOR RELATIONS BOARD FOR FURTHER PROCEEDINGS**

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REX E. LEE

*Solicitor General*

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
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## **MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS AND TO REMAND THE CASE TO THE NATIONAL LABOR RELATIONS BOARD FOR FURTHER PROCEEDINGS**

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For the reasons set forth below, the Solicitor General, on behalf of the National Labor Relations Board, requests that the portion of the judgment of the court of appeals on which certiorari was granted be vacated and that the case be remanded to the Board for reconsideration in light of *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. No. 173 (Feb. 22, 1984).

1. On November 14, 1983, this Court granted the Company's petition for a writ of certiorari limited to the question whether the conduct of two strikers, in telling a nonstriker at his home that they would "take care of" him if he continued to work during the strike, was such serious misconduct as to deprive the strikers of the protection of Section 7 of the National Labor Relations Act, 29 U.S.C. 157, and thus their reinstatement rights under the Act. In concluding



that the strikers were unlawfully discharged for this misconduct, the Board applied the standard that verbal threats unaccompanied by physical acts or gestures do not constitute strike misconduct sufficient to warrant a denial of reinstatement (Pet. App. A40). The court of appeals affirmed, finding that the Board's standard "comports with Section 7 of the Act \* \* \*" (Pet. App. A20).

In its petition for certiorari and brief on the merits, petitioner contends (Pet. 8-13; Br. 7-14) that the Board's "physical acts or gestures" standard is inconsistent with Section 7 of the Act. It urges adoption of the *McQuaide* Standard followed by the First and Third Circuits, i.e., "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977) (quoting *Local 542, International Union of Operating Engineers v. NLRB*, 328 F.2d 850, 852-853 (3d Cir.), cert. denied, 379 U.S. 826 (1964)); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977).

2. On February 22, 1984, the Board issued a supplemental decision in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. No. 173, in which it abandoned its prior standard that verbal threats unaccompanied by physical acts or gestures do not warrant a denial of reinstatement.<sup>1</sup> The Board stated (slip op. 7): "Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the *per se* rule that words alone can never warrant a denial of reinstatement in the absence of physical acts." The Board, instead, adopted the *McQuaide* "objective test" for determining whether

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<sup>1</sup>Copies of the Board's decision in *Clear Pine Mouldings* have been lodged with the Court and provided to petitioner.

verbal threats by strikers justify an employer's refusal to reinstate, i.e., " 'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act' " (slip op. 7; see also *id.* at 15 (concurring opinion)).<sup>2</sup>

3. Since the Board no longer adheres to the standard governing the assessment of strike misconduct that petitioner challenges in this case and has adopted, for this and future cases, the *McQuaide* standard (which petitioner contends is the proper standard), there is no longer a legal issue warranting resolution by this Court. The only issue that remains is the application of the *McQuaide* standard to the facts of this case. That is a task which should be performed by the Board in the first instance. See *Bachrodt Chevrolet Co. v. NLRB*, 411 U.S. 912 (1973); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245-250 (1972); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Accordingly, it is respectfully submitted that this motion should be granted.

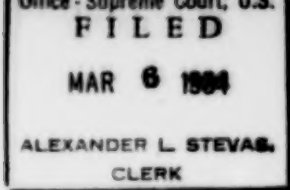
REX E. LEE  
Solicitor General

MARCH 1984

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<sup>2</sup>The Board overruled "[p]revious Board decisions that failed to apply this standard, including the cases cited in fn. 8, *supra*" (slip op. 8 n. 14; see also *id.* at 15 n.2 (concurring opinion)). One of the cases listed in footnote 8 is "*Georgia Kraft Co.*, 258 N.L.R.B. 908, 912-913 (1981), *enfd.*, 696 F.2d 931 (11th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3386 (U.S. November 14, 1983) (No. 83-103)" (slip op. 6 n.8). The Board added that, in accordance with its usual practice, it would apply the *McQuaide* standard "to all pending cases in whatever stage" (slip op. 8 n. 14).

89-103



268 NLRB No. 173

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D--1403  
Prineville, Ok

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLEAR PINE MOULDINGS, INC.

and

Case 36--CA--3129

INTERNATIONAL WOODWORKERS OF  
AMERICA, LOCAL NO. 3--200, AFL--CIO

SUPPLEMENTAL DECISION AND ORDER

On 9 March 1983 Administrative Law Judge David G. Heilbrun issued the attached supplemental decision. The General Counsel and the Respondent filed exceptions and supporting briefs,<sup>1</sup> and the Charging Party filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>2</sup>

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<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The General Counsel has excepted to the judge's failure to grant its motion partially to strike the Respondent's answer to the backpay specification. The specification alleged that Robert Anderson and Rodney Sittser are entitled to backpay from the end of the strike to the time the Respondent makes them a valid offer of reinstatement. The Respondent's answer to the specification alleged that neither Anderson nor Sittser had applied for reinstatement. At the backpay hearing, however, the Respondent adduced testimony in support of its argument that neither former striker is entitled to reinstatement and backpay because each had (continued)

268 NLRB No. 173

findings,<sup>3</sup> and conclusions<sup>4</sup> only to the extent consistent with this Decision and Order, and to adopt the judge's recommended Supplemental Order as modified.

The present proceeding is concerned with issues of reinstatement and backpay calculation under the terms of the Board's Decision and Order reported

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<sup>2</sup> engaged in strike misconduct. The General Counsel now argues that interjecting the strike misconduct issue into the case at the hearing constituted an attempt by the Respondent to change its answer. The General Counsel contends that the Respondent knew of the alleged strike misconduct at the time it filed its answer and that the Respondent should have affirmatively alleged it in the answer. The General Counsel moves to strike the Respondent's so-called amended answer and requests that the Board not consider evidence adduced on the strike misconduct issue.

Even assuming that the Respondent should have affirmatively alleged the strike misconduct in its answer to the backpay specification, we are of the opinion that the General Counsel cannot now complain of this omission. The record reveals that the General Counsel never objected to the introduction of any testimony by several witnesses, including Anderson and Sittser, on the strike misconduct issue. In fact, the General Counsel fully and actively participated in the examination of these witnesses. At this point in the proceeding, the General Counsel is estopped by his failure to object at the hearing. Accordingly, we deny the General Counsel's motion partially to strike Respondent's answer.

<sup>3</sup> The Respondent has excepted to the award of backpay to Larry Sheffield, claiming that, until his reinstatement, Sheffield worked for a company other than the Respondent at a rate of pay higher than the rate the Respondent would have paid him. We find that this fact, standing alone, is irrelevant to whether Sheffield is entitled to an award of backpay, because Sheffield's gross wages for hours actually worked would have been higher than his interim earnings if the Respondent had reinstated him.

The Respondent has excepted to the judge's finding that the Union did not undertake the duty of notifying striking employees when they should return to work. We find it unnecessary to rely on the judge's finding on this point, because the Respondent has not claimed that the Union actually failed to notify any employees or that any particular employee failed to apply for reinstatement due to lack of notice.

<sup>4</sup> The Respondent argues that the Board should apply what it calls the "special factors" doctrine. In so arguing, the Respondent refers to the unfair labor practices that the Board found it committed and claims that it engaged in those activities in detrimental reliance on Board law in existence at the time. The Respondent thus argues that the equities are so compellingly in its favor as to outweigh the imposition of the traditional Board remedy here, i.e., the grant of backpay. We are not persuaded by the Respondent's argument. The Respondent has not demonstrated that this case is so factually or legally extraordinary as to warrant our departure from imposing traditional Board remedies. Moreover, the Respondent's contention is untimely, because it should have been raised at the unfair labor practice stage of this proceeding.

at 238 NLRB 69 (1978), enfd. 632 F.2d 721 (9th Cir. 1980). We agree with the judge's determination as to the amount of backpay due to all claimants except Rodney Sittser and Robert Anderson, who shall be denied reinstatement and backpay, and Bruce Reed, who shall be denied backpay. Contrary to the judge, we conclude that Sittser and Anderson engaged in conduct justifying the Respondent's refusal to reinstate them and that Reed was lawfully terminated for failing to report his absence from work before the strike began.

1. The Strike Misconduct of Rodney Sittser and Robert Anderson

A. The Facts

1. Rodney Sittser

One week prior to the strike Sittser and two other employees "'cornered'" employee Johnny Webb against a wall at work and told Webb he would have to go on strike as voted by the other employees. When Webb said that he had been on vacation when the strike vote was taken, the employees began shoving Webb, and Sittser stated that Webb should watch out because they might burn his house or garage or something. Webb testified that Sittser repeated this threat to him over the telephone on several other occasions.

Sittser also had a prestrike encounter with employee Don Clark at Clark's home. According to Clark, as the two men discussed the strike and the possibility of employees dropping out of the Union, Sittser became progressively angrier. Clark heard Sittser make a phone call to Union Business Agent Phillip Douglass during which Sittser suggested that a group of union members visit an employee named Cecil Barber to "'straighten him out.'" Sittser also told Clark that the hands of certain knife-grinding personnel should be broken. Clark testified that his experience with Sittser made him so nervous that he put his house up for sale in anticipation of getting a job elsewhere.

The final incident involving Sittser also involved Helen Wright, who had resigned from the Union at the start of the strike. Shortly after the strike began, Wright was leaving work at the end of her shift when Sittser flagged down her car and told her that she was taking her life in her hands by crossing the picket line and would live to regret it. Wright testified that she took alternate routes to work after this conversation because Sittser's remarks frightened her.

## 2. Robert Anderson

When the night shift ended at 1 a.m. on 6 August 1977, there were 40 to 50 pickets outside the plant who were carrying baseball bats, tire irons, and ax handles and were accompanied by dogs. Nonstriking employee Don Close testified that picketers stopped a truck belonging to nonstriker Ron Reese, jerked open the doors, and broke the windows. Close identified striker Robert Anderson as using a 2-foot-long club to beat on the truck. Night-Shift Superintendent Jerry Payne testified that he saw the doors of Reese's truck open with people hanging on the doors trying to pull Reese out. In addition, Payne saw nonstriking employee Jerry Sherrer try to leave the plant on a motorcycle when a person Payne later identified as Anderson swung at Sherrer with a club.

As Close proceeded out of the plant, picketers called him names and beat on his truck, causing a dent near a window. Close became so nervous at the prospect of being blocked in by the picketers ahead of him that he backed his truck up, knocking over Anderson in the process, and exited in another direction. Nonstriking employee Tom Tucker testified that Anderson hit Close's truck with a club, was knocked over when Close's truck rolled back, and then looked up from his position on the ground to threaten Tucker with the words,



"I am going to kill you, you son-of-a-bitch."<sup>5</sup> Nonstriker Steve Hardt testified that, as he attempted to drive through the picket line, Anderson hit his car with a club, leaving a one-quarter-inch-deep dent in the rain gutter on the passenger side.

#### B. The Administrative Law Judge's Decision

The judge specifically discredited Rodney Sittser's denials and credited the testimony of Webb, Clark, and Wright that Sittser made verbal threats of violence. The judge also credited the testimony of Close, Payne, Tucker, and Hardt, and specifically found that on 6 August 1977 Robert Anderson carried a clublike object with him which he used to hammer on vehicles leaving the plant. Of particular note is the judge's inference, based on all the credited testimony, that Anderson went to the picket line "equipped and ready to engage in pugnacious behavior."

Despite these findings, the judge concluded that Sittser's strike-related threats and Anderson's picket line misconduct were not sufficiently serious to disqualify the two strikers from reinstatement. The judge observed that Sittser's verbal threats were not accompanied by any further actions and occurred only during a short period near the beginning of a 4-month strike. The judge also noted that Anderson's threatening conduct on the picket line was limited to a single incident during the first week of the strike. The judge concluded that these were minor, isolated acts of the type that the Board has excused as trivial misconduct not egregious enough to deprive strikers of the Act's protection.

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<sup>5</sup> Anderson was still carrying the club when he threatened Tucker, even though he had been knocked to the ground.

### C. Analysis

Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 also grants employees the equivalent right to "refrain from" these activities.

Previously, the Board has held that "not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act" and that "minor acts of misconduct must have been in the contemplation of Congress when it provided for the right to strike . . . ." <sup>6</sup> However, the Board has also acknowledged that "serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act." <sup>7</sup>

The difficulty lies in deciding whether particular strike misconduct results in the loss of statutory protection the employees otherwise would have. In the past, the Board has held that verbal threats by strikers, "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words," do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers. <sup>8</sup> On the other hand, the Board has held that verbal threats which are accompanied by physical movements or contacts, such as hitting cars, do constitute serious strike misconduct. <sup>9</sup> The Board summarized its standard for finding strike misconduct

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<sup>6</sup> Coronet Casuals, 207 NLRB 304, 305 (1973).

<sup>7</sup> Id. at 304.

<sup>8</sup> W. C. McQuaide, Inc., 220 NLRB 593, 594 (1975), enf. denied in pertinent part 552 F.2d 519 (3d Cir. 1977). See also A. Duie Pyle, Inc., 263 NLRB 744 (1982); Georgia Kraft Co., 258 NLRB 908, 912--913 (1981), enf. 696 F.2d 931 (11th Cir. 1983), cert. granted 52 U.S.L.W. 3386 (Nov. 14, 1983) (No. 83--103); Arrow Industries, 245 NLRB 1376 (1979); MP Industries, 227 NLRB 1709, 1711 (1977).

<sup>9</sup> Hedstrom Co., 235 NLRB 1198, 1198--99 (1978), enf. 629 F.2d 305 (3d Cir. 1980); Pepsi Cola Bottling Co., 203 NLRB 183 (1973), enf. (continued)



based on verbal threats in Coronet Casuals, where it stated that "'absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against nonstrikers . . .'"<sup>10</sup>

We disagree with this standard because actions such as the making of abusive threats against nonstriking employees equate to "'restraint and coercion'" prohibited elsewhere in the Act and are not privileged by Section 8(c) of the Act. Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, we agree with the United States Court of Appeals for the First Circuit that "'[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker.'"<sup>11</sup> We also agree with the United States Court of Appeals for the Third Circuit that an employer need not "'countenance conduct that amounts to intimidation and threats of bodily harm.'"<sup>12</sup> In McQuaide, the Third Circuit applied the following objective test for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate: "'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or

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<sup>9</sup> in pertinent part 496 F.2d 226 (4th Cir. 1974); Alabaster Lime Co., 194 NLRB 1116 (1972).

<sup>10</sup> Coronet Casuals, 207 NLRB at 304--305.

<sup>11</sup> Associated Grocers of New England v. NLRB, 562 F.2d 1333, 1336 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200.

<sup>12</sup> NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975). We read the McQuaide standard to essentially adopt a "'reasonably tends to restrain and coerce'" measure for the loss of reinstatement rights.

intimidate employees in the exercise of rights protected under the Act.<sup>13</sup>  
 We believe this is the correct standard and we adopt it.<sup>14</sup>

The legislative history of the Labor Management Relations Act supports the adoption of such a standard. Although the Act specifically recognizes the right to strike,<sup>15</sup> and although any strike which involves picketing may have a coercive aspect, it is clear that Congress never intended to afford special protection to all picket line conduct, whatever the circumstances.<sup>16</sup> The legislative history of the Labor Management Relations Act clearly indicates that Congress intended to impose limits on the types of employee strike conduct that would be considered protected. The right to strike embodied in Section 13 of the Act was modified with the passage of the Taft-Hartley Act in 1947. The amendments to Section 13 included a provision that nothing in the Act shall be construed "to affect the limitations of qualifications on" the

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<sup>13</sup> Id. at 526 (quoting Operating Engineers Local 542 v. NLRB, 328 F.2d 850, 852--853 (3d Cir. 1964), cert. denied 379 U.S. 826).

<sup>14</sup> Previous Board decisions that failed to apply this standard, including the cases cited in fn. 8, above, are overruled to the extent they are inconsistent with our decision today.

In accordance with our usual practice, we shall apply the Third Circuit standard to all pending cases in whatever stage. Midland National Life Insurance Co., 263 NLRB 127, 133 fn. 24 (1982).

We would also apply an analogous standard to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the protection of Sec. 7 of the Act.

<sup>15</sup> Sec. 13 of the Act.

<sup>16</sup> See generally H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., reprinted in Legislative History of the Labor Management Relations Act, 1947 at 542--544. "It is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the Act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the Act." Id. at 544. "[I]n section 10(c) of the amended act . . . it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharging were committed in connection with a concerted activity." Id. at 543.

right to strike. The legislative history of this amendment <sup>17</sup> indicates that it was designed, inter alia, to incorporate into the Act the restrictions on the scope of protected strike activities found by the Supreme Court in Fansteel Metallurgical Corp. v. NLRB.<sup>18</sup> In Fansteel, although the specific type of striker misconduct was different from that presented in the instant case, the reasoning of the Court is nevertheless applicable here. There, striking employees had seized their employer's plant. The Court held:<sup>19</sup>

The seizure and holding of the building was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company . . . or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society. [Emphasis added.]

Interpreting Section 13 (even before modification of that section by Taft-Hartley), the Court held that "this recognition of 'the right to strike' plainly contemplates a lawful strike, ---the exercise of the unquestioned right to quit work."<sup>20</sup> The Court went on to state:<sup>21</sup>

There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights.

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<sup>17</sup> Views of Senator Taft, Rep. No. 105, accompanying S. 1126, 80th Cong., 1st Sess., reprinted in Legislative History of the Labor Management Relations Act, 1947 at 434.

<sup>18</sup> 306 U.S. 240 (1939).

<sup>19</sup> Id. at 253.

<sup>20</sup> Id. at 256.

<sup>21</sup> Id. at 257--258.

There is also evidence in the legislative history of the Taft-Hartley Act that Congress was acutely aware of, and concerned with curbing, picket line violence in general.<sup>22</sup>

We believe it is appropriate, at this point, to state our view that the existence of a "strike" in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other objects of intimidation. As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering, similar to that found in Section 8(c).<sup>23</sup>

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<sup>22</sup> For example, the House Committee on Education and Labor, by Congressman Hartley, stated:

For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act . . . .

The employer's plight has likewise not been happy . . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees . . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism.

Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess, reprinted in Legislative History of the Labor Management Relations Act, 1947 at 295--296.

<sup>23</sup> This of course does not prevent a union from advising its members of the possible consequences crossing a picket line may have under lawful provisions of the union's constitution and bylaws.

In deciding whether reinstatement should be ordered after an unfair labor practice strike, the Board has in the past balanced the severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct.<sup>24</sup> We do not agree with this test. There is nothing in the statute to support the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices. Rather, it is for the Board to fashion remedies and policies which will discourage unfair labor practices and the resort to violence and unlawful coercion by employers and employees alike. In cases of picket line and strike misconduct, we will do this by denying reinstatement and backpay to employees who exceed the bounds of peaceful and reasoned conduct.<sup>25</sup>

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<sup>24</sup> *Coronet Casuals*, 207 NLRB at 305 fn. 15. See also *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955), which holds that, where collective action is precipitated by an employer's unfair labor practice, a finding that the employees' conduct is not protected under Sec. 7 does not, ipso facto, preclude the Board from ordering the employer to reinstate the employees if such an order would effectuate the purposes of the Act, and which uses the same balancing test to determine whether reinstatement is warranted.

<sup>25</sup> Balancing the misconduct of strikers against the seriousness of the employer's unfair labor practice is inappropriate because it condones misconduct on the part of employees as a response to the employer's unfair labor practice and indeed makes it part of the remedy protected by the Act. Retaliation breeds retaliation and, in the emotion-charged strike atmosphere, retaliation will likely initiate an escalation of misconduct culminating in the violent coercive actions we condemn. It would be virtually impossible for all practical purposes for employees to know what is expected of them during a strike because balancing remains illusive and would be applied only long after the operative events have occurred. Likewise we believe that the unclear and permissive standards previously employed by the Board have failed to adequately protect employee rights. Rather, it is our purpose to discourage any belief that misconduct is ever a proper element of labor relations. Only in this way can we honor the Act's commitment to the peaceful settlement of labor disputes without resort to coercion, intimidation, and violence. Therefore, we refuse to adopt a standard which will allow the illegal acts of one party to justify the wrongful acts of another.



Accordingly, we find that the Respondent's denial of reinstatement to Robert Anderson and Rodney Sittser did not violate the Act.

Applying the above standard to the present case, the acts of striker Anderson, in carrying a 2-foot-long club, using it to swing at a nonstriking employee motorcyclist, and using it to beat on vehicles of nonstriking employees, are each sufficient to warrant denial of reinstatement, for each of these acts reasonably tended, under the circumstances, "to coerce or intimidate employees in the exercise of rights protected under the Act." The circumstances clearly indicate that violence or instilling a fear of bodily harm was the reasonably intended use of the club where strikers, at the time, were also carrying tire irons, baseball bats, and ax handles, and were accompanied by dogs. Such conduct is inherently coercive and intimidating with respect to the exercise of employees' Section 7 right to refrain from engaging in protected activities. Likewise, Anderson's verbal threat to kill nonstriking employee Tucker was also unprotected since it was similarly coercive and intimidating with respect to Tucker's exercise of his Section 7 rights. This is particularly true here where Anderson was equipped with a weapon and had in fact been using it. Finally, Anderson's conduct in striking Close's truck with a club, an act of property damage, tended to coerce or intimidate employees in the exercise of their protected right to refrain from striking.

We also find that the conduct of striking employee Sittser was unprotected. His threat to nonstriking employee Wright to the effect that she was taking her life in her own hands by crossing the picket line, and would live to regret it, clearly had a reasonable tendency to coerce and intimidate her with respect to the exercise of her rights under the Act. Similarly, Sittser's repeated threats to employee Webb, which included threats to burn

Webb's house, are egregious examples of statements which reasonably tend to coerce and intimidate employees in the exercise of statutory rights. Sittser's statement to employee Clark to the effect that the hands of certain knife-grinding personnel should be broken is coercive, because, although ostensibly it referred to employees other than Clark, it reasonably tended to coerce and intimidate Clark in the free exercise of his Section 7 rights. In this context, we also find that Sittser's less specific threat made in Clark's presence to "'straighten . . . out'" another employee likewise reasonably tended to coerce and intimidate Clark.

## II. The Termination of Bruce Reed

On Friday, 29 July 1977, Bruce Reed was asked to work on Saturday, 30 July, and agreed to do so. Reed never reported for work, however, nor did he call in to say he would not be there. Reed went out on strike with the other employees on 1 August. He also went to the Company on 1 August to pick up a paycheck. At that time he was informed that he had been terminated for failure to report his absence from work. Reed testified that he knew he was supposed to call in if he could not show up for work, but claimed he did not call in because he did not have a telephone and doubted that his supervisor could be reached.

The judge found that "'Reed cannot be considered validly terminated prior to acquiring status as an unfair labor practice striker. That was his plain intention, and the intervening circumstance of an overtime assignment should not be available to this employer in frustration of that objective.'" We disagree.

The record establishes that the Respondent consistently maintained and enforced a policy of terminating employees who fail to report their absence when scheduled to work. The judge noted that two other employees, Chandler and

Laudon, had been terminated legitimately for their failure to call in, and he found that they were not entitled to backpay. Bruce Reed falls within this same category. Because he was lawfully terminated, we find that he is not entitled to backpay.<sup>26</sup>

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Clear Pine Mouldings, Inc., Prineville, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Supplemental Order except that the attached Appendix is substituted for that of the administrative law judge.

Dated, Washington, D.C., 22 February 1984

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Donald L. Dotson,

Chairman

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Robert P. Hunter,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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<sup>26</sup> No issue of reinstatement is raised as to Reed, as he has been reinstated.



MEMBERS ZIMMERMAN and DENNIS, concurring:

We join our colleagues in adopting the McQuaide<sup>1</sup> test as the appropriate standard for determining whether strike misconduct warrants denial of reinstatement. In so doing, we reject the previous Board rule that a verbal threat could never justify denial of reinstatement in the absence of physical gestures.<sup>2</sup> Furthermore, we agree that the McQuaide standard applies not only to misconduct directed at nonstriking employees but also, by analogy, to strikers' retaliation against nonemployees such as supervisors.<sup>3</sup> As the First Circuit held in Associated Grocers, the common question is whether the particular strike misconduct "in the circumstances reasonably tends to coerce or intimidate."<sup>4</sup>

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<sup>1</sup> NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975).

<sup>2</sup> Member Dennis joins her colleagues in overruling past Board decisions that are inconsistent with the new standard. See fns. 8 and 14, above.

Member Zimmerman participated in the decision in Georgia Kraft Co., 258 NLRB 908 (1981). On further consideration, he believes that, to the extent the Board's test there was described as precluding a denial of reinstatement solely because physical gestures or violence did not accompany the statements under consideration, the test was too narrow. In his view, the absence of physical gestures or violence, though a consideration in such cases, is not dispositive of whether reinstatement of an employee is an appropriate exercise of the Board's responsibility to remedy unfair labor practices. He believes that in adopting a standard that encompasses threats that are wholly verbal, however, the Board must take care not to condemn statements which are not reasonably likely to instill fear of physical harm. Under common law and statute, threats unaccompanied by acts ordinarily are not illegal or actionable. The first amendment protects pure speech from governmental restraint, even protecting a threat to kill where the circumstances show it to be hyperbole. Watts v. United States, 394 U.S. 705 (1969). The Board's application of the McQuaide test of coercive tendency must be informed by the knowledge that picket line actions often include tense, angry, and hostile confrontations in which emotions run high and threats are hurled that cannot reasonably be interpreted as auguries of violence. The Board must take care not to impose on industrial disputes a code of ethics alien to the realities of confrontational strikes and picket lines and contrary to our national tradition of free speech. See NLRB v. W. C. McQuaide, Inc., 552 F.2d at 528, and cases cited in fn. 20 therein.

<sup>3</sup> See fn. 14, above, and Associated Grocers of New England v. NLRB, 562 F.2d 1333, 1337 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200.

<sup>4</sup> Id. at 1336.

Although we join Chairman Dotson and Member Hunter in adopting the McQuaide test, we do not adopt their reasoning in part I. C. including their analysis of the right to strike, Section 8(c) of the Act, and the legislative history of the Act. We rely instead on the circuit court opinions in McQuaide and Associated Grocers.

Applying this standard, we agree with our colleagues that Sittser engaged in strike misconduct that reasonably tended to coerce or intimidate other employees. Sittser and two other employees "'cornered'" employee Webb against a wall at work to insist Webb go on strike; when Webb was equivocal about his intentions, the employees began shoving Webb, and Sittser threatened to burn Webb's house or garage. Sittser repeated this threat to Webb over the telephone several times. Sittser also told employee Clark that the hands of certain knife-grinding personnel who might drop out of the Union should be broken. Further, Sittser stopped nonstriker Wright's car as she was leaving work to tell her she was taking her life in her hands and would live to regret it. Sittser's remarks were not ambiguous, but rather were clear threats of property damage and bodily harm.<sup>5</sup>

Similarly, we concur in our colleagues' finding that Anderson's conduct reasonably tended to coerce or intimidate employees within the meaning of the standard we have adopted. Anderson carried a 16-inch-long wooden club on the picket line, brandished it in a menacing fashion toward nonstriking employees leaving the plant, swung it at a nonstriking employee who was driving a motorcycle out of the employee parking lot, and used it to hit at least three vehicles that nonstriking employees were driving out of the employee parking lot, causing at least one dent in a vehicle he hit. Anderson was in the middle

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<sup>5</sup> Because this conduct warranted denying Sittser reinstatement, we would find it unnecessary to rely on Sittser's statements during a telephone call to Union Business Agent Douglass which employee Clark overheard.

of a crowd of 40 to 50 pickets that night, who were blocking egress from the employee parking lot, trying to pull nonstriking employees out of their vehicles, and beating on vehicles with clubs. After being knocked down when nonstriker Close backed up his truck in order to get around the crowd to leave the plant, Anderson threatened to kill nonstriker Tucker, who happened to be nearby at the time. The Act does not extend its protections to such obviously frightening conduct as carrying and swinging a weapon, using it to inflict damage to vehicles, and threatening to kill a nonstriker.<sup>6</sup>

Accordingly, we would deny reinstatement and backpay to Rodney Sittser and Robert Anderson. From an examination of all of the circumstances present in this case, particularly that Sittser and Anderson directed their misconduct against innocent employees who are protected by the Act, we would find that their reinstatement would not effectuate the policies of the Act. See generally Mosher Steel Co. v. NLRB, 568 F.2d 436 (5th Cir. 1978); NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955).<sup>7</sup>

Dated, Washington, D.C., 22 February 1984

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Don A. Zimmerman, Member

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Patricia Diaz Dennis, Member

NATIONAL LABOR RELATIONS BOARD

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<sup>6</sup> While Anderson's threat to kill arguably may have been associated with Close's knocking him down, Anderson did not direct his threat to Close, but rather threatened Tucker, who had done nothing to provoke him. In finding that Anderson was engaged in misconduct, Member Zimmerman does not rely on the incident involving Anderson and nonstrikers Close and Tucker.

<sup>7</sup> In all other respects we agree with Chairman Dotson and Member Hunter.

## APPENDIX

Beverly Bishop	\$2,548
Juanita Burr	1,212
William Carter	1,467
Roy Chambers	1,175
Larry Chancellor	69
Oliver Chandler	1,409
Allen Dendy	1,158
David Dunn	1,263
Raymond Dunn	1,207
Donna Winget	1,069
Charlotte Evans	1,702
Thomas Ferguson	1,563
Dariene Forseth	1,078
Wanda Freese	3,062
David Fuller	1,033
Alonzo Hayre	1,515
Kenneth Heitz	923
Michael Hensley	1,662
Maximiano Hernandez	1,506
Douglas Holt	1,181
Laura Jones	834
Audrie Jordon	1,033
Lauren Kelhoyoma	1,128
Daniel Kinnear	559
Peter Koutsouris	1,703
Winnie Koutsouris	1,394
Colleen Maw	1,224
Henry McLamb	1,114
Douglas Menges	1,823
Donald Meritt	1,504
Debbie Miller	1,776
Janice Miller	1,308
Arthur Morton	1,017
Mary McKinney	792
Rose Mary Nelson	1,755
Don Pemberton	1,099
Rodney Prewitt	1,703
Karen Pryer	1,304
Eunice Rice	837
Sandra Clem	996
Larry Sheffield	457
Jim Smith	2,682
Maxine Jones	2,992
Liss Gonser	1,421

Lucille Streetman	\$ 972
Thomas Tugman	2,909
Marvin Weger	1,023
Melvin Weger	1,623
Richard Whittenburg	1,281
Jean Williams	1,538
Daniel York	1,188
James Hensley	6,068
Richard Zimmerman	1,033
Carl Chancellor	7,085

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
BRANCH OFFICE  
SAN FRANCISCO, CALIFORNIA

CLEAR PINE MOULDINGS, INC.

and

Case No. 36-CA-3129

INTERNATIONAL WOODWORKERS OF  
AMERICA, LOCAL NO. 3-200, AFL-CIO

Daniel R. Sanders, Counsel for  
the General Counsel.  
Rick W. Roll, Tillamook, OR, for  
the Union.  
Verne W. Newcomb, Portland, OR,  
for Respondent.

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge:

On August 14, 1980 the United States Court of Appeals for the Ninth Circuit entered judgment on its earlier opinion affirming the National Labor Relations Board's Order as reported at 238 NLRB 69. In this earlier case unfair labor practices were found to have been committed by Clear Pine Mouldings, Inc., called Respondent, the remedy for which required Respondent to take certain affirmative action, including reinstatement of unfair labor practice strikers with backpay, dismissing, if necessary, employees hired subsequent to the commencement of a strike on August 1, 1977. The Board's Order further required Respondent to make whole any employee who lost money as a result of unilateral institution of substitute health insurance coverage. The strike was found to have been "direct~~ly~~" caused" by Respondent's "dilatatory, surface bargaining" over a course of negotiations earlier in 1977.

Controversy having arisen over the amount of backpay, if any, due under terms of the Board's Order, the issues raised in a backpay specification dated August 31, 1981 were heard as supplemental proceedings at Bend and Prineville, Oregon, during July and August 1982.

Upon the entire record, my observation of witnesses and consideration of post-hearing briefs, I outline the following:

Setting of the Case

Respondent is a wood products manufacturer in Prineville, Oregon, employing a workforce that at times has exceeded 300 persons. International Woodworkers of America, Local No. 3-200, AFL-CIO, called the Union, has been



certified as exclusive collective bargaining representative for production and maintenance employees since 1965, and from that time onward has reached a series of labor contracts for the plant. The last of these, having a 2 year duration, expired on June 1, 1977. Renewal negotiations opened with the Union's written request dated March 14, 1977, and proceeded thereafter both before and during the described strike. Respondent was represented in the process by Vice President and General Manager Thomas S. "Stu" Turner, Personnel Manager Robert Lockyear, Attorney Verne W. Newcomb, and others, while the Union's chief negotiators were Business Agent Phillip Douglass, and I.W.A. Western States Regional Council No. 3 Vice President Hugh Kidwell. 1/ A 5-member committee of Respondent's employees also participated in the bargaining process on the Union's behalf.

After approximately 3 months of strike activity, Douglass and Kidwell delivered Turner a letter November 21, 1977. It was signed by Kidwell and read:

The strike against your Company will officially end on November 28, 1977 at 12:01 a.m., your employees are ready, willing and want to return to work.

This letter is on behalf of each and every former striking employee, and it constitutes an unconditional offer and demand by your former striking employees to return to work for your Company.

We re-emphasize that this return to work demand is unconditional. There are absolutely no conditions of any kind--express, implied or otherwise. Any and all prior statements, discussions, letters, agreements and everything else of every kind and nature that can or may be construed as conditions upon return to work of strikers, or in any manner inconsistent with this request, are hereby rescinded, revoked and are of no effect.

Your former striking employees demand that you return them to work on November 28, 1977 or as soon as each employee can receive proper notification. Demand is hereby made that you displace striker replacement workers employed by you curing the strike, if or as may be necessary to ensure return of strikers to work.

Please give this your immediate attention. We stand ready to assist upon request.

1/ D. C. "Gundy" Gunvaldson, President of Regional Council No. 3, also attended a significant bargaining meeting that occurred on October 18, 1977.

Separate and apart from the above, we, the International Woodworkers of America, stand ready to continue contract negotiations with your Company as soon as a meeting can be arranged.

Turner made a written reply to Kidwell on November 25, 1977 reading:

In answer to your letter dated November 21, 1977, and confirming our telephone conversation of November 23, 1977, with Phil Douglas, we suggest that any individual strikers who apply for re-instatement to contact the personnel office. Re-instatement will of course be conditioned on the availability of suitable employment and resolution of any outstanding charges of strikers' misconduct involving individual applicants.

On the occasion of October 18, 1977, a major effort had been made by the parties to resolve the strike of then over 2-1/2 months duration. A full complement of individuals assembled for this meeting as scheduled at a Prineville motel under auspices of a federal mediator. Douglass testified that Gunvaldson, as experienced president of the entire Regional Council for this area of the industry, traveled to such particular meeting in an attempt to lend further good offices toward resolution of the stubborn and difficult dispute. In the course of what was recorded as a session spanning more than 3 hours (primarily caucusing time), Gunvaldson voiced a summation of what Kidwell had said respecting a Union proposal for ending the strike. According to notes of the meeting, made a part of this record as the Union's only documentary evidence, Kidwell had broached the subject of discontinuing strike action during the last 25 minutes of the session and following an extended caucus. As taken by the Union's negotiating committee secretary, the minutes of this final portion of the meeting read, in part, as follows:

NEWCOMB: The company hasn't anything further to say at this time.

KIDWELL: For a matter of record we are proposing an unconditional return to work for all employees and continue to bargain in good faith and make every effort to resolve this in the near future.

NEWCOMB: We have no opposition to bargaining in good faith, but we must ask you if that offer is good for the 106 number and if the company advises you that there are a number of people who there is no intention to reinstate, and would not offer reinstatement.

KIDWELL: Its our feeling you are prejudging people, who ever they are and those people are entitled to a fair hearing. So our position would include everyone with



5 an unconditional return to work. As far as your  
proposal we are not necessarily rejecting your  
proposal in its entirety, but what you proposed on 8%  
is below all the information that we have been able  
to compile as to what has been negotiated through out  
the moulding industry.

10 NEWCOMB: The principle company that we heard was Doris  
and that settled with an other organization, the  
settlement was 8% the first year, and August 1977  
cancelled out their pension plan and continued with  
company sponsored health & wealth, I've heard of no  
other moulding companies with settlements, some have  
15 secondary, non that are competitive that have  
exceeded 8%. Only settlement that TOC represents is  
Doris. LPIW settlement is what you're saying you  
don't like but not sweeping it off.

20 KIDWELL: Yes, not.

NEWCOMB: We have no other offer, and not ready or  
prepared to at this time make offer.

25 KIDWELL: We are not prepared at this moment to make a  
counter proposal.

NEWCOMB: We don't have any further offers or proposals to  
make at this time.

30 GUNVALDSON: So that it is vividly clear and understood,  
in order to take and restore relations that must  
exist with our employee and management, or decision  
maker, Hugh's statement is correct and should be  
understood.

35 We are now making a firm proposal to you for an  
unconditional return to work that includes all  
employees and will immediately resume work and  
continue to organize to affect a settlement that  
40 would be economical to the company and to your  
employees who are now on strike.

45 NEWCOMB: Are you saying some of your group would return  
if the rest would not? The company does have, as I  
have told Hugh, and the mediator, a list of people,  
who by their conduct, disqualified them, and I won't  
go into that or the length of the list. Are you  
saying that some of your group, that if the persons  
not on this list if, and we have several right  
50 now, would everyone be willing to come back to work

but those that the company would not take back. Are you saying its everybody or no body?

KIDWELL: You said it right there.

NEWCOMB: We will continue to examine that list.

KIDWELL: You said you have nothing further to offer or say?

NEWCOMB: Not at this time.

KIDWELL: We haven't either, but hope as soon as possible we can continue negotiations subject to call by the mediator.

Gunvaldson died approximately 2 weeks later, and the parties presently stipulate that Kidwell is unable to appear for medical reasons and that no adverse inference is to be drawn from the Union's failure to produce him as a witness. Douglass testified in a manner generally harmonious with these minutes, while committee member Daniel York added that those comprising the rank-and-file negotiating body, including himself, were well aware in advance of what Gunvaldson would propose or confirm. Faye Jordan, a retired employee and former negotiating committee member, added that the tone of Gunvaldson's brief involvement was based on "something which had to be done" about the stalled progress toward a new contract.

Attorney Newcomb, testifying by narration, recalled that following the described meeting Gunvaldson telephoned him to urge a waiving of strike misconduct accusations in the context of all strikers being put back to work. Newcomb asserted that he told Gunvaldson on this occasion that Respondent was amenable to restoring all the people as jobs became available, except for two or three special cases involving egregious misbehavior.

It was following this that Douglass and Kidwell devised a course of action from which the November 21, 1977 letter resulted. Once having so decided, a comprehensive array of notification techniques (word of mouth, telephoning, CB radio communications and Union hall notices) was set in motion to marshal members for a needful special meeting. This ensued with Kidwell reading the proposed letter, fielding debate and conducting a vote which ratified the letter. Delivery of the letter to Turner, with Douglass accompanying, followed immediately. Douglass testified that one or two days after delivery of the letter he had a conversation with Lockyear (or possibly Turner) having to do with "the mechanics" of people returning to employment. Douglass recalled comprehending that Respondent did not want the total group of strikers to appear at one time and for this reason an agreement arose which contemplated sending the strikers in on a "staggered basis." Douglass was soon to supervise the process by which members gathered at the Union hall and were sent into the company in groups of five or seven on an interval basis that went into a second day. Douglass made the point that in general the persons making up such groups took their lunches on the day of appearance based on the thought of starting back to work.

Turner's version concerning aftermath of the strike was that upon delivery of the Union's letter dated November 21, 1977, and Kidwell's accompanying remarks that the strike was over and all individuals "unconditionally" wished to resume work, he had conversed further with Kidwell at the time saying that Respondent "would bring the people back as jobs become available." He also recalled subsequently speaking with Douglass, probably by telephone, to suggest that the group appearance technique be used because the company office was too small and would generate confusion. Turner added in his testimony that in so speaking with Douglass he pointed out how "it would help" if the Union made contact with strikers and assisted them in applying for reinstatement. Turner denied giving any indication that individuals would actually be put back to work immediately upon their appearance.

Turner enlarged on his testimony at a later point in the hearing by recalling how he had focused on the union's letter a day or so after delivery and became "a little bit alarmed" because its wording did not seem to accord with "the agreement that we had as to how the strike would end" and embodied the incorrect implication that Respondent would have the difficult responsibility of making contact with strikers who could be well dispersed after the passage of 4 months from when they had last actively worked. This spurred Turner to write his letter dated November 25, 1977, the contents of which he noted were never objected to by Douglass. Turner recalled the phenomenon of people starting to show up at the plant in small groups to apply for reinstatement at the expectable time, and that many individuals were put back to work as jobs became available. Turner expressly testified that business was good in the fall of 1977, particularly as to October following which an estimated 25 percent drop in business occurred as continuing through December, but that a spurt then happened resulting in January 1978 being "probably the best (he'd) seen in this business."

Following commencement of the strike on August 1, 1977 Dick Frambes, a retired law enforcement officer and later investigator for Respondent, became assistant personnel manager under Lockyear. Lockyear's testimony was more definite concerning principles applied by Respondent, including that interviewees seeking reinstatement were questioned as to their exact availability for return, where they could be located and whether they were free to work any shift. Lockyear denied that the process involved indicating to such persons when they would be called to work. As will be covered in certain individual cases, both personnel functionaries had considerable contact with former strikers both in person and by telephone. 2/

2/ They also had extensive contact with numerous individuals before the strike was over, and a number of such contacts give rise to particular issues under the backpay specification. Frambes added his somewhat uncertain recollection that in dealing with a striker's reinstatement prospects the company tended to use "a seniority list."

Pleadings

The backpay specification (as amended) covers 63 persons, 3/ and is structured on a "representative employee(s)" theory of calculating gross backpay. General Counsel contends that Respondent was under a duty to forthwith reinstate all persons covered by the Union's assertedly unconditional offer to end the strike in contemplation of strikers returning to work. The underlying litigation established their status as unfair labor practice strikers, as to whom reinstatement would be absolute even to the extent of displacing those previously hired in replacement. General Counsel alluded to a customary "5-day rule" whereby employers so situated could react to the end of such a strike and incur backpay liability only for any excess over such time. General Counsel contends that this customary approach should not be applied here, because overall revelations allegedly show that Respondent did not recognize its duty, 4/ and for that reason the underlying purpose of the 5-day rule is not present. Accordingly the backpay specification does not admit of this grace period, and the typical date for commencement of monetary liability is the point of November 28, 1977 when the Union fixed an official termination of its strike.

In fact, most strikers were returned to the plant by early 1978, and this condition constitutes the principal pattern found in the backpay specification. The document shows in comprehensive fashion, by calendar quarter, a tabulation of equivalent earnings from one or more similarly situated (representative) employees associating to what a particular discriminatee would have earned had their reinstatement been prompt and complete, including re-establishment of an appropriate wage rate under all the circumstances. This theory of gross backpay is rendered in detailed appendix sheets to the backpay specification, on which admitted interim earnings and pertinent offsetting expenses of the search for work are also shown. On January 14, 1982 an Amendment to Backpay Specification issued, substituting and modifying appendixes in various regards, including adding Richard Zimmerman and Carl Chancellor to the list of claimants, as well as revising a number of earlier net backpay amounts in individual cases. 5/ The resultant grand total of all claimed monetary liability, after allowing for Tina Jones being dropped from this proceeding and taking into account what her claimed total net backpay had been, is \$252,013. The Regional Director expressly

3/ Originally 62 former employees were listed, however General Counsel withdrew Tina Jones from consideration by motion made in the course of hearing. This was counterbalanced, and more, by the later addition of Richard Zimmerman and Carl Chancellor as claimants.

4/ As of late 1977 the underlying unfair practice allegations were about to be heard by Administrative Law Judge James M. Kennedy, and this occurred over the span of December 6-8, 1977. His decision issued June 14, 1978 and the conclusions and recommended Order there embodied thus became the first adjudicative basis for the now-settled characterization that an unfair labor practice strike is what had been underway during the latter months of 1977 (until terminated in late November that year.)

5/ These changes represented "technical" adjustments of computation by the compliance officer, and the curing of inadvertence where detected.



reserved the right to compute and claim further gross backpay subsequent to the computation cut off date of August 31, 1981, in terms of contentions that proper offers of reinstatement have not as yet been made to certain individuals.

Respondent filed written answers to both the backpay specification and the amendment thereto. Upon commencement of the hearing, General Counsel moved to partially strike these answers, in particular regard to a failure of proposing any alternative backpay formula to that routinely denied in the answers. General Counsel cites Airports Service Lines, Inc., 231 NLRB 1272 and 3 States Trucking, Inc., 252 NLRB 1088, in premising an argument based on Section 102.54 of the Board's Rules and Regulations, from which it is contended that this section, and settled doctrine relating thereto, requires a Respondent to clearly plead an alternative to any reasonable backpay formula that has been devised, or suffer the consequences of having stated formula admitted as being true. General Counsel prevailed on this motion, and now seeks to further strike Respondent's answers insofar as they do not allege defenses that associate to the colloquy made over the entire 6 days of hearing as spanning 5 weeks time, or to the evidence itself in particular cases. Upon consideration of this point I am satisfied that Respondent has fairly and fully articulated its position on the numerous individual issues raised in the backpay specification, and I decline to broaden the ruling on General Counsel's Motion to Partially Strike. Cf. Sheet Metal Workers Local 13, etc., 266 NLRB No. 10.

#### Issues

There are a variety of issues to be resolved from this litigation. In a chronological sense, the process begins with ascertainment of whether certain individuals appearing as claimants in the backpay specification were employed as of the time a strike commenced on August 1, 1977, or were terminated at or soon after such commencement. The major issue of the case concerns events occurring at and shortly after the midnight hour of Friday, August 5, 1977 and through Saturday, August 6, 1977 at the plant premises, as to which Respondent contends that misconduct as engaged in by Robert ("Andy") Anderson was of a character and degree that warranted his termination from employment retroactively to that time, or, alternatively, disqualified him from any right of reinstatement and concomitant entitlement to backpay. <sup>6/</sup> Proceeding in point of time as it passed from August into November 1977, there are issues of whether certain individuals were terminated by reason of failure to accept offered employment under circumstances which gave rise to an asserted entitlement for the employer to consider them to have repudiated any desire for further or continued employment, or, as relating to individuals who quit, constructively quit, or abandoned their position of employment, or as related to whether such individuals correspondingly abandoned the strike then in progress.

<sup>6/</sup> A comparable issue with respect to Sittser also embraces his alleged conduct in expressing verbalisms to certain non-striking employees, both before and after the strike began.

Beyond this time span the fundamental issue of the case arises in terms of whether or not the Union made and maintained an unconditional offer of return to work on behalf of all strikers, and an associated issue of whether the Union assumed to itself, gratuitously or otherwise, a responsibility of seeing that all strikers actually interested in participating in a resumption of active employment, as presumably contemplated by the blanket notice of strike termination and desire of strikers to return to work, were notified of steps to be taken and monitored as to whether or not they made an appropriate, timely presentation of themselves. As to this "fundamental" issue, Respondent contends that the Union agreed to undertake a presentation of all persons covered by the return to work offer, and that any individual instance in which a person did not so appear would relieve the employer of any liability toward that person. Contrarily, General Counsel and the Union contend that as a matter of fact and law the obligation to respond to an unconditional offer of return to work by unfair labor practice strikers reposed constantly and exclusively with the employer, and any failure to present oneself (other than where unjustifiably grounded) would not impair the reinstatement rights and backpay entitlement of such individuals. Under the latter contention, it is conceded and confirmed that the Union did, at least, undertake to assemble small five to seven member groups of employees, and cause them to appear at Respondent's place of business but this occurred only as a convenience to the situation and as a natural outgrowth of the established collective bargaining relationship.

Chronologically yet beyond this, there are group and individual issues of the litigation which relate to circumstances such as absence from the labor market area, adequacy of the search for work in mitigation of damages offsetting expenses, post-strike termination, declining of employment in an overt or constructive sense, and an issue concerning whether James (Jim) Smith was physically capable of resuming his former employment at any time from late November 1977 until actually returning to duty on the basis of a medical release dated March 8, 1978.

#### Evidence

##### Misconduct Issues

##### a. Rodney Sittser

John /"Johnny"/ Webb testified that he had worked for Respondent since about 1973, and as of August 1977 was a night shift leadman on re-saws. He recalled that about a week before commencement of the strike he was "cornered" by three men while coming down a corridor towards the break room. The group, which included Rodney Sittser and Alonzo Hayre, ringed him against a wall, saying he would have to go on strike as recently ratified. Webb testified that he reminded them how he had been on vacation when the vote was taken, at which point they started shoving him with Sittser saying he should watch out because they might burn his house or garage or something. 7/

7/ Webb added that Sittser voiced all such threats to him on the telephone both before and after this occasion, in the course of "pursuit/" that became "nerve-racking" over several months.

Don Clark testified that while an employee of Respondent during 1977 he was also personally acquainted with Sittser. He recalled that on the last weekend of July 1977 Sittser and his family visited Clark and his family at the latter's home. In the course of about 2-1/2 hours the two men talked, with Clark recalling that as they discussed the imminent strike and circumstances of certain employees dropping out of the Union, Sittser became progressively, visibly angrier. Clark testified that Sittser took the telephone and seemingly called Douglass to urge that the "Ochoco boys" <sup>8/</sup>visit an employee named Cecil Barber in order to "straighten him out." Clark recalled Sittser continuing with remarks that the hands of key knife grinding personnel should be broken. Clark testified that the experience with Sittser left him "edgy" to the point that he put his house up for sale in anticipation of looking elsewhere for work. Eventually this did not occur, and he remained on a production job with Respondent. Nothing untoward happened with respect to any of the allegedly threatened persons.

Helen Wright, a retiree from Respondent, testified that she knew Sittser in August 1977 as a co-worker of close functional proximity. She had resigned from the Union at around the start of the strike, and she recalled an occasion a few days after the strike started when while going home for her evening meal around 7:30 to 8:00 p.m. Sittser had flagged down the car in which she was riding with her late husband. Wright testified that Sittser approached and agitatedly told her with much profanity that she was taking her life in her hands by crossing the picket line and would live to regret it. The experience frightened her to the extent of taking alternate routes on days following so as to avoid a repetition.

Sittser testified that he had started work with Respondent around 1974 and remained continuously until 1977, ending up as a cutter on the night shift. He recalled formerly being friendly with Clark, and once visiting him prior to the strike. Sittser testified that the possibility of a strike was discussed in general terms between them, with Clark becoming upset over other employees withdrawing from the Union. Sittser remembered how Clark alluded to the many bad things that could happen in a strike, to which Sittser simply expressed a hope that no one get hurt. He also told Clark that individuals could be fined for crossing a picket line. Sittser denied making a call to Douglass, saying instead that he had telephoned only about child care matters, and that he made the "boys from Ochoco" remark passingly. Sittser categorically denied making any statement about the breaking of anyone's hands, and as to Wright denied ever stopping her car on a street or having any conversation of the type described. Sittser had no recall of ever telephoning to Webb in any context that would relate to the strike, or having any conversation with him generally and directly about supporting the strike. Further, he expressly denied ever threatening to burn any home, garage or other building of Webb's. Hayre corroborated his denials.

8/ This term applied to several men who worked at Ochoco Lumber Company, a unionized mill in the Prineville vicinity. Individuals popularly believed to be described by this term, and the connotation of toughness that it carried, included Tom Harris and Tom Young who were president and vice president of the Union, respectively.

## b. Robert ("Andy") Anderson

Respondent's plant premises are depicted in an aerial photograph that was received into evidence as that party's Exhibit No. 5. 9/ Orientation to this photo should be made by considering the left (longer) edge as the "bottom," with the main roadway at the front of the facility angling north-easterly from such bottom point of reference. The employee parking lot is thus in the lower center of the photo, and south from the structures. By combining the graphics of the photo with uncontroversial testimony of record, it is seen that a row of landscaping extends southerly from the separate office building near the road, and a slight rise or berm is traversed by cars typically exiting the lot. At a point on the bottom of the photo, a more recognizable exit route leads past a stop sign.

Friday, August 5, 1977 was the ending date for the first full week of the strike. As this day and evening wore on, various rumors materialized concerning what was shaping up when the night shift would end at 1:00 a.m. (on Saturday, August 6, 1977). From the Union standpoint Douglass understood there would be "trouble" at 1:00 a.m., while molder set-up man Dan Close, and others, had heard there would be trouble stemming from the Union people having clubs and dogs, plus an inordinant number of pickets compounded by extended consumption of alcoholic beverages. In this context the parties advanced their respective witnesses on the issue of what actually happened, and what role, if any, was played by Andy Anderson in a short but tumultuous span of time.

Respondent's first witness on the episode was Close. 10/ He testified to leaving the plant at 1:00 a.m. quitting time and seeing 40 to 50 pickets as he got in his car to leave work in company of his wife. There were several vehicles ahead of his, including that of Ron Reese, whose pick-up truck he saw being stopped by picketers and having its doors jerked open and its windows broken. Close testified that Andy Anderson was one of the persons opening doors and beating on the vehicle with a 2 ft. long club. Reese "floor boarded" his way through, and Close proceeded next as he was called names and had his own pick-up truck beaten on resulting in a dent behind the rear passenger window. Becoming nervous and frightened, he felt blocked by men ahead and at that point backed up hitting Andy Anderson. 11/ Upon this happening Close exited in another direction and went to the town police station.

9/ Identification by Respondent's counsel was made at page 709 of the transcript, and the photo was received into evidence at page 710. As actually appearing in the second folio of Respondent's documentary exhibits, it is inadvertently marked as "official Exhibit No. GC-4." This numbering is to be disregarded, and the document should correctly be considered Resp. Exh. No. 5 as intended and received.

10/ It is to be remembered that activity transpired in full natural darkness, illuminated essentially by vehicle headlights and large industrial lights only one of which shines back into the parking lot.

11/ Close was unable to identify Andy Anderson as a person beating on his own vehicle.



Night shift superintendent Jerry Payne testified that he observed employees leaving work when their shift of August 5, 1977 ended, at which time he estimated 30 to 40 pickets were in place. Payne saw Jerry Sherrer as the first person out of the parking lot on a motorcycle, which was swung at with a club by some unidentified person. Payne believed that the next car in line was that of Steve Hardt, and seeing that definite trouble was brewing he hurried back inside the mill to call police. Upon re-emerging he saw the Ron Reese vehicle with "a bunch of people hanging on /it/" and the driver's side door open with others trying to get Reese out. Payne associated the person who had swung (or "waved") a club at Sherrer as the same person soon knocked to the ground, and from that circumstance identifiable as Andy Anderson. The club seen by Payne from "approximately 300 feet" away, was about 18 to 20 inches long and 2 or 3 inches around.

Jerry Sherrer testified that as he exited his motorcycle on the occasion, he swerved several to avoid a swinging motion made by a person holding an object "like a policeman might carry." <sup>12/</sup> Bryan Jones testified that upon leaving work he was in a car behind the trucks of both Reese and Close. He and his companion Donny Powell held back in the parking lot for awhile, and during this time he saw that the pickets, including a considerable increase in number from ones present at the 8:00 p.m. lunch break, were holding little league ball bats, tire irons and axe handles with which they were hitting on cars. Jones characterized the action as "tapping" and "screaming." He was close-by when Andy Anderson was knocked down, and when this happened Jones was near enough to the scene to hear Jim Smith say vengefully to Andy Anderson that he (Smith) was "going to kill the little son-of-a-bitch." Jones added that as all this commotion was occurring, Payne was urging everyone to "break it up" and get out of the parking lot. Vicki Duncan testified that she and her fiance went to the plant at approximately 12:55 a.m. that night in order to see their friend Ron Reese. When the quitting whistle blew she saw Reese driving out, but suddenly several people were around his pick-up pulling the doors open and seemingly trying to get him out. She heard yelling and glass breaking in the dark and confusion, estimating that between 30 and 35 pickets were present. Steve Hardt testified that upon finishing his shift he attempted to drive through a picket line of approximately 40 persons, at which time Andy Anderson hit his car with a club. He had not known Andy Anderson at the time but knew he was the same person as was soon hit by Close's truck. Hardt's wife was in the car at the time, and he described the damage from the club as being a 1/4 inch deep dent in the passenger side rain gutter.

Frambes, the first of Respondent's rebuttal witnesses on this issue, testified that late on the evening in question he had gone outside the office building and from its corner 150 feet away saw a vehicle approach near the stop sign area of the parking lot. Frambes recalled the four or five occupants of that particular car opening its trunk and pulling out clubs or ball bats which they passed along to pickets. After that he heard yelling and

<sup>12/</sup> To the extent that Sherrer's testimony named Andy Anderson as the individual who swung the object, it is disregarded consistent with a granting of Union counsel's motion to strike any name identification.

5 banging on cars, however Frambes could not identify any person involved. Robert Anderson (coincidental name similarity to Andy Anderson) was formerly a  
 10 Prineville police officer and on duty the night of August 5-6, 1977. He was at the scene around 1:00 a.m. seeing rowdiness and intoxication. Respondent  
 15 introduced its Exh. No. 8 through Robert Anderson, as being a photograph of an object picked up at the parking lot scene on the night in question and maintained thereafter as police property. 13/ Rob Johnson testified that he  
 20 was a night shift employee of Respondent in August 1977, and recalled the "ruckus." He estimated 50-60 pickets as being present when the shift ended, and testified to seeing Ron Reese nearly dragged from his pick-up truck as  
 25 glass in it was broken. He remembered another car also being hit, and the driver, seemingly angered, slamming back into a man knocking him down. Johnson identified him as a person named Anderson, and the same individual as he had seen hitting on cars with a sort of "baton." Webb testified that as a  
 30 night shift employee coming off work on August 5, 1977, he saw that the large group of strikers at the edge of the road had clubs, pipes and several dogs. When departing employees started out of the lot in their vehicles, Webb saw them beaten on in turn, and particularly recalled how the first rig had its windows broken out. After this he saw Close attempt to exit, and have his new  
 35 pick-up truck hit with a club by a person who was later knocked down by Close. Tom Tucker testified that he, too, was a former second shift employee of Respondent on the night of August 5, 1977, and had seen 30-40 people standing out along the road when the shift got off. They seemingly had the further exit blocked, causing drivers to start out closer to the plant. Tucker saw  
 40 Reese's pick-up being damaged, and recalled that Andy Anderson was hitting rigs with some kind of a club or stick. Tucker identified "Ochoco" boys Harris and Young as being present along with Larry Stevens as part of the group closed around the Reese vehicle. Tucker testified that Andy Anderson hit Close's pick-up and was in turn knocked down when that driver "rolled  
 45 back." Tucker was only a few feet away, and he testified that Andy Anderson looked up from where he was laying to say "I am going to kill you, you son-of-a-bitch." Tucker gave a challenging answer, but then others ran up including Tom Harris who effectively told Andy Anderson to act unconscious like he was hurt.

35 General Counsel's first witness on this issue was James Hensley. He testified that most of the pickets late on August 5, 1977 were grouped at a center point adjacent to the parking lot. Hensley recalled that second shift  
 40 employees emerged from the plant that night and seemed to be advancing on the pickets with clubs, conduit and brick mold taped to their hands. Momentarily he saw Reese's pick-up truck "screeching" to a halt, and when its doors flew open he heard a yell to watch out because Reese could have a gun. Hensley then saw an officer of the Union jump in and restrain Reese from reaching under his seat. Reese then backed crazily free, spinning his vehicle,  
 45 throwing gravel and soon hitting a stop sign. Hensley denied that Andy

13/ The 16 inch long object depicted in this exhibit is best described as an  
 50 "Indian club", which is authoritatively illustrated and defined as a "metal or wooden club shaped like a large bottle, used singularly or in pairs for exercising the arms." The Random House Dictionary of the English Language (unabridged) 1979, page 724.

Anderson had a club at any time on the night in question. On the matter of whether any picket had a club, Hensley testified that he had not seen any. He termed the number of pickets as not exceeding 40, but in any event perhaps the largest assemblage up to that time. Jim Smith was a picket captain on the night of August 5, 1977. Smith was the person who yelled out that Reese had a gun as he saw the vehicle heading toward and scattering the pickets. He recalled how someone grabbed Reese's arm, that he broke loose and crazily backed away and into the stop sign. Smith denied that Andy Anderson was involved with Reese during these moments, and he administered to his friend when knocked down. Smith testified that about one-third of the emerging night shift employees had weapons such as pieces of wood casing or metal conduit, and that a "few more than usual" number of pickets were present that night.

Douglass testified that he drove 6 or 7 Union members to the picket line, arriving at about 12:55 a.m. and parking across the southerly exit road of the lot. His passengers included Tom Harris, Tom Young, Jerry Richardson (the Union's financial secretary and another Ochoco member employee), Andy Anderson, Jim Smith and possibly Larry Stephens. He soon saw an emerging pick-up being driven fairly fast and later "spitting up" dirt and gravel as it hit the stop sign after Harris had been on its running board. Douglass testified that to his knowledge none of the pickets or anybody transported in his car that night had weapons or clubs of any nature. Neither did he see any night shift employee carrying any weapon or "instrument that could be /so/constructed."

Alonzo Hayre testified that he was on the picket line that night and saw emerging employees holding clubs as they prepared to leave. He saw Close respond to being called a scab by "barrelling out," and then backing up abruptly causing Andy Anderson to be struck. Hayre denied that Andy Anderson had had a club at any time during the incident, and similarly denied that any pickets had any clubs or tire irons. Additionally, Hayre did not see or hear cars being hit, but did see a window of the Reese vehicle broken. Melvin Weger testified that he saw vehicles emerging from the parking lot, and that Close had reached the center of McKay Road without facing hindrance at the point that he backed through the picket line knocking Andy Anderson down. He had also observed the Reese vehicle, but saw no one atop it or that its doors were opened (until after it hit the stop sign). Weger denied that a large car of the type driven by Douglass was pulled across the southerly parking lot exit as to block it. In terms of menacing objects, Weger saw no pickets with clubs or tire irons, and believed that even picket signs were cast down when "trouble first started."

General Counsel produced rebuttal testimony from Allen Dendy, who saw a few of the emerging employees with clubs but emphasized that picketers were mostly concerned with keeping clear of exiting vehicles. Dendy testified that Close had backed up recklessly without provocation, as Andy Anderson had not sported a club, picket sign, or any object in his hand during the incident. Larry Stephens testified that he did arrive in the Douglass car, and noticed Andy Anderson positioned at a more northerly point. Stephens denied that Andy Anderson had anything in his hands, or that any "Ochoco" boy

5 had come around him after he was struck and on the ground. Andy Anderson himself testified that he, too, arrived with Douglass, and soon saw night shift employees emerging belligerently. He testified to being approximately 25 feet away from the Reese vehicle as it came out, and that he was not carrying any sort of object.

Bruce Reed

10 As of July 1977 Bruce Reed was employed by Respondent under the supervision of Terry Turner, who headed the shipping and finish departments. Reed testified that he was prepared to go on strike starting Monday, August 1, 1977, yet on the previous Friday he was asked to work on Saturday (July 30, 1977.) He agreed to do so, but in fact neither showed up nor called in. He  
15 commenced picketing on a regular basis with other strikers on August 1, 1977, and eventually applied for reinstatement when the strike was over in November of that year. Further, he had gone into the company on the Monday of strike commencement to pick up the pay check and was himself informed of having been terminated. Reed testified that he did not call in to advise he would not  
20 work on the pre-strike Saturday because he did not have a telephone and because he doubted that his immediate supervisor would be there to reach anyway. He conceded to knowing that he was "supposed to call in" under such circumstances.

25 Terry Turner testified that it was customary to terminate employees for failure to call in after having been scheduled for work, and in Reed's case he personally prepared a "Report of Termination" dated July 30, 1977 with that as a basis. Such action was routed through the personnel office, and Lockyear acknowledged it by entering his initial on the paper. 14/

30 Tim Chandler

The Backpay specification sets forth a claim for this individual from August 31, 1977 to July 10, 1978. He did not testify, and the General Counsel argues his case only tangentially in the post-hearing brief where  
35 reference made to his "situation being of a similar general category" as others.

40 Respondent's Exh. No. 11 is a document purportedly bearing Tim Chandler's signature which acknowledges a "final termination check" and was endorsed by Lockyear on August 31, 1977 to the effect that a termination from employment had been made because of "failure to call in as required by company rule." Lockyear also testified concerning Tim Chandler saying that this individual had worked during the strike and that business practice at the time  
45 was to solicit a signed slip from a person undergoing termination.

14/ Reed was reinstated around December 1977, and by March 31, 1978 had reached a point of job position and earnings rate that ended his claimed backpay period.



Kristie (Allison) Laudon

This individual commenced employment on August 2, 1977, immediately after the strike had begun. On September 12, 1977, she applied for membership in the Union, and thereafter picketed until the strike was over. She went in with others of a small group seeking reinstatement, and was eventually reinstated very early in 1978. Respondent introduced a "Report of Termination" dated on or about September 10, 1977 in the handwriting of supervisor J. E. Puckett. It recorded that Laudon had been "fired" for not calling in on scheduled work days of Friday, September 9 and Saturday, September 10, (1977), adding the comment of her being a "poor worker." Laudon recalled that Puckett had been her foreman over the one month span of her employment, but she denied having been fired because of, or at the time of, signing up for the Union. She was uncertain whether she had reported for work on the dates noted, or whether she had called in to report any intentions.

Janice Grimm

This individual testified that she had participated in the strike from its inception, however financial difficulties caused her to inquire of Lockyear about return to work after about a month. Her former job had been on the swing shift, and when Lockyear offered her an opening on "graveyard clean-up" she declined. She subsequently received a letter dated October 10, 1977 which read:

A JOB OPENING HAS DEVELOPED IN THE VINYL DEPARTMENT ON NIGHT SHIFT.

AS THIS WAS YOUR DEPARTMENT AND SHIFT, YOU ARE BEING AFFORDED THE OPPORTUNITY TO FILL THAT VACANCY.

ON SEPTEMBER 6, 1977, YOU EXPRESSED A DESIRE TO RETURN TO WORK. SEVERAL ATTEMPTS HAVE BEEN MADE BY TELEPHONE TO ADVISE YOU OF THE OPENING AND ALL HAVE BEEN UNSUCCESSFUL.

THIS LETTER IS TO ADVISE YOU OF THE OPENING, AND TO LET YOU KNOW THAT THE VACANCY WILL BE FILLED IF YOU DO NOT RESPOND BY THURSDAY, OCTOBER 13, 1977.

Grimm testified that she did not respond to this communication, but later in October 1977 had a telephone conversation with Lockyear on the subject of retroactive backpay as had been received by others. He told her she was ineligible by reason of not being on the payroll after she had failed to respond to the letter and her position with the company was terminated. Grimm continued picketing on a regular schedule until the strike ended, however she did not apply with other Union members because of Lockyear's advice the month before.

Kearon Kinsey

This individual participated in the strike from inception onward, but recalled receiving written notice in October to return to work by a given

date or have the job offered to another person. She did not respond to this letter, but about a week later, around early November, went to the company office and spoke with Lockyear and Frambes in the personnel office. She told them of needing her job, and their response was that she would be telephoned if an opening arose. This did not happen, and when the strike ended she reappeared as part of a group. Lockyear told her that she had been terminated because of not responding to the quoted letter.

Lockyear testified that Kinsey called in several times after going on strike wanting to resume work. He conferred with Stu Turner about her situation, and then wrote a letter dated October 11, 1977, which read:

CONCERNING YOUR REQUEST FOR RE-INSTATEMENT, WE HAVE CONTACTED YOU SEVERAL TIMES REGARDING JOB OPENINGS, THE LAST TIME BEING TODAY 10-11-77.

IF WE DO NOT HEAR SOMETHING POSITIVE FROM YOU BY 7:30 A.M. THURSDAY 10-13-77, WE WILL ASSUME THAT YOU HAVE FOUND SATISFACTORY EMPLOYMENT, AND ARE NOT INTERESTED IN RETURNING AT THIS TIME.

Stu Turner testified that he had made the decision to terminate Kinsey in November 1977, after she had been given a job at her request for which she failed to report for work or made any explanatory contact.

#### Wanda Freese

This individual testified that she had been a day shift employee in Respondent's finish department, and participated in the strike from its inception to its conclusion. She then routinely applied for reinstatement as were others, and recalled being interviewed by Lockyear. She told him in response to inquiry about availability, that she would accept any job except that "night work would be almost impossible" because she had children ages 15, 13 and 7 to care for at home. Freese testified that Lockyear was writing all the while, that he did not particularly respond to her remarks about not wanting night work, and that upon being thanked she left.

In January or February, 1978 Lockyear contacted her about a job opening on nights, however she adhered to her point that it would be "really ... hard." She thus declined the offer, recalling that Lockyear seemed to understand her grounds and left the impression he would call again. In fact, Freese was fully reinstated in mid-April 1978. 15/

15/ The backpay specification alleges April 25, 1978 as the date to which backpay is claimed for Freese. However, associated appendix S-2 states that Freese had been reinstated by "p/r/e 4-15-78," which I interpret to mean during a payroll period ending Saturday, April 15, 1978. Further, the appendix states that this reinstatement resulted in "her proper post-strike /hourly/rate" of \$4.41. I note this ambiguity, and presume that the appendix controls.

Jim Smith

This individual was one of the group applicants that appeared in conjunction with the strike being terminated. He testified that when he reported in, Lockyear had asked whether he was able to work, to which he answered affirmatively saying only that a bruised knee was causing him to limp slightly. Arrangements were then made for examination by a company doctor, however Smith recalls that the actual appointment did not materialize until March when the medical release was signed by Thomas L. Bristol, M.D. Smith testified that his injury had occurred while doing work in the woods, which he continued with there for a time. Further, he recalled having been previously seriously injured while an employee of Respondent in the past and without missing any work.

Smith had been on Employee Benefits Insurance (E.B.I./Workmen's Compensation) from December 13, 1977 to March 5, 1978. A physician's report on occupational injury by Dr. Bristol on October 31, 1977 had diagnosed bruised ligaments of the knee not preventing a return to regular employment, however a later examining physician, John P. Carroll, M.D., had summarized clinical findings with a recommendation of continued physical therapy, weight bearing only as tolerated and "probably no return to work for 3 to 4 weeks." Dr. Carroll's report was dated December 20, 1977.

James Hensley

This individual testified that he made routine application for reinstatement when the strike ended, but was not contacted until at least 3 weeks had passed. He then learned that Lockyear had been trying to reach him, and when he appeared at the company office along with employee Don Pemberton, Lockyear offered him a night shift job rather than one on days which he had previously worked. Hensley angrily declined, testifying that he left Lockyear's office but first saying his action should not be construed as a quit. He has no contact since, and General Counsel contends that his backpay period continues to run.

Lockyear testified that he had conversed with Hensley in early January, and had a return to work offer angrily refused. Upon this Lockyear prepared a Report of Termination dated January 10, 1978 recording that Hensley had "quit" while remaining "very mad" at the company.

Carl Chancellor

This individual testified that he had engaged in the first 2 weeks of the strike and then looked for a job at The Dalles, Oregon, about 125 miles from Prineville. He maintained his principal residence in Prineville and frequently returned to the local area over the succeeding months. On two or three such occasions he saw Lockyear personally to inquire about the status of things and chances of returning to work with Respondent. Additionally, he provided Lockyear with his temporary address at The Dalles. Carl Chancellor did not go in with the main groups of persons seeking prompt reinstatement after termination of the strike, however he did contact Lockyear further

5 during that general point in time on two separate occasions. He testified that Lockyear told him "that there wasn't any chance of me coming back to work." Carl Chancellor had on at least one occasion bitterly expressed to Faye Jordan and other Union members that he would never again take a job with Respondent, that he denied ever making such an utterance to anyone in management. Respondent never made a job offer to him and, as with Hensley, General Counsel contends that the backpay period continues to run.

10 Lockyear testified that he knew Carl Chancellor as an employee of the paint line. He recalled that prior to the end of the strike Chancellor had once come to him asking for his job back. Lockyear noted that in such instances over the August-November 1977 time span there were cases in which such individuals were returned to work and other cases in which they were not. On March 7, 1978, Lockyear endorsed Carl Chancellor's Employment Card with the notation "failed report to work after strike/Nov. 28, 1978 (sic)." Lockyear testified that around that point in time of March 1978 Carl Chancellor had come into his office saying that he decided to stay with his job at The Dalles where he earned more money than with Respondent. Lockyear believed that was the last meeting of significance he ever had with Carl Chancellor.

20 Connie and Jerry Miller

25 These persons are husband and wife. Neither of them testified in the course of the hearing, and evidence concerning their employment status is confined to certain personnel records assembled as Resp. Exh. 20. As to Connie Miller a report of termination initially dated "7-2-77" (presumably meaning August 2, 1977) was handwritten by a supervisor. In the portion contemplating a "Reason For Termination" the following was entered:

30 Connie would not cross the picket line, sent word in she wanted to quit (by Phone).

A second document purporting to be a handwritten note to the file states:

35 Millers phone has been disconnected, I could not get ahold of Connie.

40 If she calls in, maybe she will come down and sign this termination.

45 A final document relating to Connie Miller is an Employment Card showing a "Termination Date" of August 10, 1977 with the notation, "would not cross picket line, sent word by phone she wanted to quit." The sole document in evidence concerning her husband Jerry Miller is another Employment Card showing his termination date as August 10, 1977 with the notation "joining Police Dept." It was stipulated between the parties that in fact Jerry Miller never joined a police department after commencement of the strike.



Dean Churchill

This individual testified that he first worked for Respondent in the summer of 1976 on a part-time summer basis. He then commenced student status at Central Oregon Community College (C.O.C.C.) as a biology major. In the summer of 1977 he applied for a full-time job and was working the night shift in that status when the strike commenced. When the college semester at C.O.C.C. began in fall 1977 Churchill enrolled for 10 credit hours, indicating in his testimony that this was not "a real high credit load" but was what he had elected to do "because I didn't have anything better to do." Churchill testified that when the strike was over he went to a Union meeting and was told that persons would be sent back in small groups. Late that same afternoon he was in a group which went to the company office where he talked with a person who he cannot now recall or identify. He did describe his appearance as being in a reception room, and that the group he was with comprised four to five individuals. He recalled being told at the time that he would be called back, but had no further contact with Respondent until applying for work sometime during 1978.

Frambes testified that he had contacted Churchill by telephone in early 1978 to offer an available job. He recalled Churchill telling him of not being available for work because he was either attending school at the time or on the verge of going back to school. Frambes later completed a Report of Termination on Churchill dated January 31, 1978 indicating he was terminated on the following basis:

When called to work from strike, he said he was back in college & not interested in working at this time ...

Richard Zimmerman

This individual testified that he went out on strike with the other employees on August 1, 1977, but by the time it ended he was working in Corvallis, Oregon. As of late November 1977 his family was still in the Prineville area, and in connection with a short visit home from his six-day work schedule in "the valley" Zimmerman learned that Union members were starting to go back for their jobs. Zimmerman testified that he went to the company office and found "a bunch of people there" waiting for interviews. Being pressed for time in terms of traveling the approximately 140 miles to reach his workplace in Corvallis, Zimmerman spoke hurriedly with a receptionist, telling her that he was able to resume work at any time and leaving both his then-current local and valley address. He saw the receptionist write the addresses down, however he does not know her name nor can he now make any physical description after the passage of years. Zimmerman testified that about a month after this episode, he received a letter from Respondent and a check for around \$100 in "back wages." A job offer was never made to Zimmerman, and General Counsel again contends that his backpay period continues to run.

Search For Work/Interim Earnings

As among the several dozen claimants, there is considerable diversity with respect to their efforts at, and success in, obtaining interim employment from and after termination of the strike. Part of this diversity stems from instances in which employment was secured prior to such termination in late November 1977, while another main part stems from differing perceptions and/or motivations with respect to seeking work of any nature following the group interviews of reinstatement applicants, all in the context of the 1977-78 winter job market in central Oregon as complicated further by imminence of the year-end holiday season.

In this general sense there are certain principles which apply. An employer may mitigate backpay liability by showing that a claimant "wilfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment." Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 199-200 (1941). This is an affirmative defense, with a burden on the employer to prove necessary facts. N.L.R.B. v. Mooney Aircraft, Inc., 366 F.2d 809, 813-14 (5th Cir. 1966). An employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment, or that low interim earnings resulted. Rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." N.L.R.B. v. Miami Coca-Cola Bottling Company, 360 F.2d 569, 576 (5th Cir. 1966). Furthermore, while a discriminatee must make "reasonable exertions" to mitigate his loss of income, he is not held to "the highest standard of diligence." N.L.R.B. v. Arduini Manufacturing Corporation, 394 F.2d 420 (1st Cir. 1968). Success is not the measure of sufficiency when discriminatees seek to achieve interim earnings; the law "only requires an honest good faith effort." N.L.R.B. v. Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955). In determining reasonableness of this effort, the employee's skills and qualifications, his age and labor conditions of the area are factors to be considered. Mastro Plastics Corporation, Etc., 136 NLRB 1342, 1359. In determining whether an individual claimant has made a reasonable search, the test must be whether the record as a whole establishes that the employee had efficaciously sought other employment during the entire backpay period. Saginaw Aggregates, Inc., 198 NLRB 598; Nickey Chevrolet Sales, Inc., 195 NLRB 395, 398-99. Finally, it is also well established that any uncertainty in the evidence is to be resolved against a Respondent as wrongdoer. Miami Coca-Cola Bottling, *supra*; Southern Household Products, 203 NLRB 881.

Here some individuals found and maintained jobs in distant parts of the state, while others worked regularly in the Prineville vicinity with various manufacturing, retailing, service or miscellaneous employers of the area. The subject was illuminated by Arthur Bigelow, former office supervisor for the Oregon State Employment Service at Prineville from 1975 until mid-1978. Bigelow characterized employment opportunity in the lumber processing industry during the 1977-78 winter as one of the "better years," without the usual "down drop that we normally had" but instead remaining "fairly steady."

He recalled the receipt of requisitions for job applicants from "various mills," including American Forest Products Company (formerly "Bendix" and "Coin") and, surprisingly, even Consolidated Pine. Bigelow remembered the unemployment rate at the time as being around the "normal" 5-6%, and he contrasted that with a current 12 to 15%. Testimony on the job market profile was also offered by Ray Gould, an individual of many years experience in the wood products industry and now employed by American Forest Products. His examination of hiring records for that firm showed that 71 persons were hired over the 3-month period of November 1977-January 1978 (18-18-35), inclusive. Gould testified that these hirings were into "plant jobs," however he had no specifics as to their wage rates and job categories, or as to which operational function needed such staffing. 16/

Art Fitzgerald, resident manager of American Forest Products in 1977 and currently, testified that the winter 1977-78 hirings were a reflection of different reasons, including "business conditions picking up." 17/

Lenny Lyle, vice-president of administration for Les Schwab warehouse center in Prineville, testified that he has been with this re-tread tire production and distribution company for 12 years. In the span November 1977-January 1978 this firm hired 7 non-office employees for entry level positions in either the retread plant or the distribution center.

Ellsworth Wright, general manager of Bend Millworks Company, testified that his firm is another direct competitor of Respondent and utilizes practically identical equipment. In early 1978 Bend Millworks reached a total complement of over 600 employees, which represented the early operational phase of "a very good year." The plant is at the north end of Bend, an estimated 45 minute drive from Prineville. Wright estimated that over a time span of November 1977 into part of February 1978, Bend Millworks was hiring at a rate of 30 to 60 employees per month. He tended to believe that this influx would include both skilled and unskilled persons. As Gould had done, Wright testified that these would be no impediment to a qualified person being hired for an active job opening simply because of being, or recently having been, on strike such as was the case at Clear Pine.

16/ Respondent reserved the right to recall Gould at a point in the hearing when he would be better equipped with documents and clarification, however this right was not later exercised.

17/ Gould had testified on July 15, 1982, while Fitzgerald testified during resumption of hearing on August 20, 1982. Respondent did not announce that Fitzgerald was intended to enlarge on Gould's testimony, but to the extent this occurred the failure to recall Gould becomes all the more understandable and I draw no inference adverse to Respondent because of this configuration. A composite of their testimony establishes that American Forest Products is a direct competitor of Respondent, is located close by, and exhibits great operational similarity including equipment used and products manufactured.

Against this background Respondent contends generally that there has been a pervasive failure to mitigate damages by claimants, and that interim earnings were available to those not wilfully idling themselves from employment. Respondent attacks the implication of futility and needlessness as associating with testimony of some discriminatees, 18/ by naming Colleen Maw, William R. Carter, Art Morton, Jordan, Debbie Miller and Hayre as persons possessed of no anticipation that they would immediately return following the strike. Respondent also points to the great number of individuals who simply registered for, and usually received, unemployment compensation benefits, but concededly engaged in no search for work or did so only with desultory effort.

### Credibility

As a component of this litigation, the resolution of credibility arises only spottily in particular instances of whether the employment relationship survived some particular episode or sequence, plus the massive diversity of testimony respecting the eventful night of August 5, 1977 and the issue concerning any verbal threats of which Sittser is accused.

In general, I am satisfied that Respondent's personnel records have a homespun integrity sufficient to give them ordinary weight. This, in turn, affects those issues as to which such records tend to corroborate to claimed experiences and actions of Stu Turner, Lockyear and Frambes.

I cannot credit Kearon Kinsey, whose testimony was hesitant, vague and unpersuasive. On this issue I credit Lockyear, whose demeanor and detail of recall respecting Kinsey was convincing. Further, I find Stu Turner creditable in this instance, particularly when tying in his recollection with the fact that Kinsey's husband was a valued employee at the plant.

I credit Hensley over Lockyear in terms of any disparity that exists between their respective versions of his post-strike interview concerning employment. Similarly I credit Carl Chancellor over Lockyear on the point of this claimant maintained an interest in returning to work, about which Respondent did know or should have known. In these two instances Respondent's documentary evidence to the contrary is rejected as erroneous recordation by Lockyear.

I credit Frambes in regard to his recollection that he extended a job offer to Churchill around January 1978, and that it was declined. There is another element to the backpay eligibility issue regarding Churchill, and it will be treated in the resolution below.

I credit the sincere-seeming Freese and Zimmerman with respect to their respective contacts about resuming work. In the scheme of things their

18/ General Counsel argues exactly to the contrary, asserting in his brief that involved employees "realistically thought" they would resume working soon after ending their strike, and that in any event a "discouraged" outlook was "understandable."



recollections were contradicted by implication, however I am satisfied that they have each conscientiously set forth accurate facts.

As to the situation of Sittser's claimed misconduct, I credit Respondent's witnesses Clark, Wright and Webb on demeanor grounds. Sittser was himself evasive and unconvincing in his denials of what was attributed to him, and this frailty surfaced in yet other areas of his overall backpay claim. To the extent that Hayre supported Sittser's version, I reject that testimony also.

As to events at and around 1 a.m. of Saturday, August 6, 1977 immediately following the night shift having completed its work, I give primacy credence to the testimony of Close, Payne, Sherrer, Jones, Hardt, former police officer Robert Anderson, Johnson, Webb and Tucker. The critical fact emerging from this array of witnesses is that Andy Anderson carried an object like a wooden Indian club to the hectic confrontation, and used it to hammer on passing vehicles until knocked to the ground by Close's reversing maneuver. I believe this interpretation harmonizes with all probabilities of the situation, particularly when intriguing testimony of Hayre is read in connection with that of Douglass. The former quite openly described key individuals associated with the picket line as apparently inebriated, while the latter all but conceded how "in effect" his large automobile had blocked off normal egress from the plant parking lot. This translates into an inference that Anderson, as part of these dynamics, went to the scene equipped and ready to engage in pugnacious behavior.

Findings of Fact and Resultant  
Resultant Conclusions of Law

On the individual eligibility issues I hold as follows:

1. Bruce Reed cannot be considered validly terminated prior to acquiring status as an unfair labor practice striker. That was his plain intention, and the intervening circumstance of an overtime assignment should not be available to this employer in frustration of that objective.
2. Respondent's documentary evidence concerning Tim Chandler is sufficient to demonstrate that he was routinely terminated after a spell of working with the strike in progress.
3. Respondent's documentary evidence concerning Kristie Laudon is sufficient to demonstrate that she had similarly been routinely terminated after being hired with the strike in progress.
4. Respondent's documentary evidence concerning Janice Grimm is sufficient to demonstrate that she displayed such equivocation toward employment with Respondent in late 1977 that she either abandoned the strike, or failed to give notification of any interest in reinstatement which, in her particular case, was a pre-requisite to backpay entitlement.

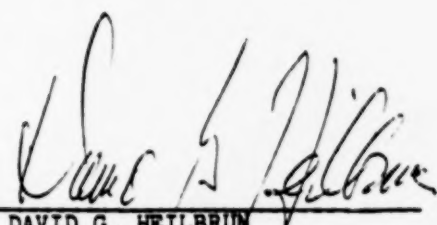
5. Respondent's documentary evidence concerning Kearon Kinsey is sufficient to demonstrate that she abandoned the strike and was validly terminated with finality effective October 13, 1977.
- 5 6. Wanda Freese did not waive any entitlement to reinstatement, nor did she fail to accept an appropriate job offer at any time prior to the end of her backpay period.
- 10 7. The medical evidence respecting Jim Smith is somewhat inconclusive, however the express entry by Dr. Carroll to the effect that Smith should not return to his regular work until well into January 1978 is sufficient to justify Respondent's delaying reinstatement here. This serves to overcome Smith's opinion of self-capability and other subjective evidence that would show an earlier ability to work. However, Respondent's overall delay into March 1978 was not adequately explained, and for this reason I hold that Smith is entitled to 1/2 of the amount calculated for the first quarter of 1978, or the reasonable net backpay figure of \$2,682.
- 15 8. The fundamental issue of how the mechanism of effectuating employee return to work following the strike is one on which I hold for the claimants. The Union's notification of strike termination and desire for reinstatement was resoundingly unconditional. The testimony of Regional Council No. 3 Vice-President John Kocker shows convincingly that such was the intent and purpose of striking Union members, and no authority reposed outside this crew for any variance. Stu Turner's responsive letter did not shift the burden of notifying employees to the Union, and attorney Newcomb's testimony does not yield this result, particularly when he concedes that no contrary agreement was reached in any binding sense. The Union's participation in sending up groups of employees for registration and company follow-up was a mere accommodation to the situation and its own desire to see members promptly working again. See J. H. Rutter-Rex Manufacturing Co., Inc., 158 NLRB 1414.
- 20 9. Respondent failed to meet its duty of extending a valid offer of reinstatement to James Hensley.
- 25 10. Respondent failed to meet its duty of extending a valid offer of reinstatement to Carl Chancellor.
- 30 11. Respondent's documentary evidence concerning Connie and Jerry Miller is sufficient to demonstrate that they did not engage in the strike and each abandoned their employment immediately thereupon.
- 35 12. Dean Churchill was not shown by convincing proof to have attained striker status, and, alternatively, declined a valid, timely offer of re-employment. Because of this he is removed from any backpay entitlement.
- 40
- 45
- 50

13. Respondent failed to meet its duty of extending a valid offer of reinstatement to Richard Zimmerman.
- 5 14. Rodney Sittser made verbal threats of injury or adversity to several individuals, however these were unaccompanied by action and did not recur over the several following months in which the strike continued. Respondent has overreacted and is woefully without justification in contending that Sittser engaged in disqualifying misconduct. His backpay claim is confirmed, except for a reduction of \$4,000, calculated as constructive intra-family interim earnings of \$500 per month for the 8 months of January-August 1981, inclusive. See Midwest Solvents, Inc. v. N.L.R.B., 112 LRRM 2276, \_\_\_ F.2d \_\_\_ (Tenth Cir. 1982).
- 10 15. Andy Anderson engaged in picket line misconduct by tapping on exiting vehicles with an ominous, club-like object, and generally menaced non-striking employees in the several moments of a single fractious confrontation. This is the "animal exuberance" which the Board excuses, and I again conclude that Respondent has baselessly seized on limited happenings in a fruitless effort to escape major monetary liability. I confirm the backpay claim of Anderson. See Coronet Casuals, Inc., 207 NLRB 304.
- 15 16. As a matter of law Respondent has not convincingly shown that any employee failed to mitigate damages by their conduct following the strike. The situation allowed a reasonable belief that reinstatement could occur any day, and the testimony of management officials from other wood products firms in the area, and from State functionary Bigelow, does not establish jobs readily available to these claimants. There is no correlation between number of applicants and hires actually processed, and the wide diversity between those who achieved interim earnings and those who hopefully waited is the exact illustration of human variances contemplated in the Phelps Dodge line of cases. I also expressly find that Don Pemberton's temporary presence in California during an early part of the backpay period was not a disqualifying removal from labor market prospects.
- 20 17. The only evidence with respect to financial loss stemming from the unilaterally substituted health care plan is testimony by Lauren Kelhoyoma to the effect that he has been "getting stuck" with annual deductibles of up to \$200 under the new plan. Respondent introduced a letter of Aetna account executive John Bayless dated June 23, 1981 stating that the substitute contract was a "duplicate plan of benefits." Kelhoyoma himself termed benefits of the old plan "more or less" paying off, and I cannot accept that General Counsel has seriously pressed this branch of the litigation. Given the enormous complexity of industrial health care plans, the meager evidence on the point is insufficient as a basis for any finding of liability running to Respondent.
- 25 30 35 40 45 50

RECOMMENDED SUPPLEMENTAL ORDER 19/

Respondent, its officers, agents, successors, and assigns, shall pay to each discriminatee the sum set opposite his or her name on the attached net backpay recapitulation marked "Appendix," together with interest as set forth in Isis Plumbing & Heating Co., 138 NLRB 716, and Florida Steel Corporation, 231 NLRB 651. 20/ Individual amounts to persons for whom no valid offer of reinstatement has yet been made are subject to adjustment based on projections from and after August 31, 1981.

Dated: March 9, 1983

  
DAVID G. HEILBRUN  
Administrative Law Judge

19/ In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

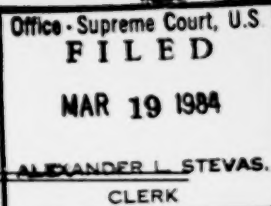
20/ Dendy's sum is reduced by the conceded amount of \$200, which Darlene Forsyth's is reduced by \$187 for a medical expense item incurred outside her backpay period. Sums listed for Juanita Burr, David Fuller, Kenneth Heitz, Eunice Rice and Larry Chancellor shall be transmitted to the Regional Director for Region 19, to be held in escrow of one year with disbursement or return as appropriate.



Robert Anderson	\$ 35,900.00
Beverly Bishop	2,548.00
Juanita Burr	1,212.00
William Carter	1,467.00
Roy Chambers	1,175.00
Larry Chancellor	69.00
Oliver Chandler	1,409.00
Allen Dendy	1,158.00
David Dunn	1,263.00
Raymond Dunn	1,207.00
Donna Winget	1,069.00
Charlotte Evans	1,702.00
Thomas Ferguson	1,563.00
Darlene Forseth	1,078.00
Wanda Freese	3,062.00
David Fuller	1,033.00
Alonzo Hayre	1,515.00
Kenneth Heitz	923.00
Michael Hensley	1,662.00
Maximiano Hernandez	1,506.00
Douglas Holt	1,181.00
Laura Jones	834.00
Audrie Jordon	1,033.00
Lauren Kelhoyoma	1,128.00
Daniel Kinnear	559.00
Peter Koutsouris	1,703.00
Winnie Koutsouris	1,394.00
Colleen Maw	1,224.00
Henry McLamb	1,114.00
Douglas Menges	1,823.00
Donald Meritt	1,504.00
Debbie Miller	1,776.00
Janice Miller	1,308.00
Arthur Morton	1,017.00
Mary McKinney	792.00
Rose Mary Nelson	1,755.00
Don Pemberton	1,099.00
Rodney Prewitt	1,703.00
Karen Pryer	1,304.00
Bruce Reed	907.00
Eunice Rice	837.00
Sandra Clem	996.00
Larry Sheffield	457.00
Rodney Sittser	23,602.00
Jim Smith	2,682.00
Maxine Jones	2,992.00
Lisa Gonser	1,421.00
Lucille Streetman	972.00
Thomas Tugman	2,909.00
Marvin Weger	1,023.00
Melvin Weger	1,623.00
Richard Whittenburg	1,281.00
Jean Williams	1,538.00
Daniel York	1,188.00
James Hensley	6,068.00
Richard Zimmerman	1,033.00
Carl Chancellor	7,085.00

Grand Total

\$145,386.00



**No. 83-103**

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**In the Supreme Court of the United States**

**October Term, 1983**

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**WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,**

*Petitioner,*

*vs.*

**NATIONAL LABOR RELATIONS BOARD and  
LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, AFL-CIO, LOCAL 246,**

*Respondents.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT**

---

**RESPONSE TO MOTION TO VACATE THE  
JUDGMENT OF THE COURT OF APPEALS  
AND TO REMAND THE CASE TO THE  
NATIONAL LABOR RELATIONS BOARD FOR  
FURTHER PROCEEDINGS**

---

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*Counsel for Respondent***

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**Petition for Certiorari Filed July 7, 1983  
Certiorari Granted November 14, 1983**

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No. 83-103

In the Supreme Court of the United States

October Term, 1983

---

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
*Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

---

**RESPONSE TO MOTION TO VACATE THE  
JUDGMENT OF THE COURT OF APPEALS AND  
TO REMAND THE CASE TO THE NATIONAL  
LABOR RELATIONS BOARD FOR FURTHER  
PROCEEDINGS**

---

Petitioner Woodkraft Division/Georgia Kraft Company opposes the Solicitor General's Motion to Remand the case to the National Labor Relations Board ("Board") for reconsideration in light of the Board's recent decision in *Clear Pine Mouldings, Inc.*, 268 NLRB No. 173 (February 22, 1984) for the following reasons:

1. The vital legal issue before this Court is whether Section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 151 *et seq.* gives striking employees the right to threaten and intimidate nonstriking employees. [See, Brief for Petitioner, Question Presented]. *Clear Pine Mouldings* does not resolve this important and recurring question. In *Clear Pine Mouldings*, the Board finally

abandoned its discredited theory that words alone can never warrant a denial of reinstatement of a striking employee. The Board adopted the Third Circuit's objective standard for evaluating threats. However, while Board Members Zimmerman and Dennis concurred in adopting the objective standard, they specifically declined to agree with any of the legal reasons the current Board Chairman and Board Member Hunter advanced for adopting the new standard. Members Zimmerman and Dennis expressly disagreed with the Board's analysis of the right to strike, Section 8(c) of the Act, and the legislative history of the Act. [Decision, 16]. Furthermore, in Footnote 2 of his concurring opinion, Member Zimmerman argues that even under the new standard, the Board may continue to condone verbal threats aimed at nonstriking employees just because they take place during a strike.

2. Only this Court can determine finally whether Section 7 of the Act protects striking employees in threatening and intimidating nonstriking employees. Obviously, the Board's adoption of the Third Circuit's objective standard for evaluating threats is welcomed and urged by Petitioner. Petitioner respectfully requests that this Court adopt this objective standard. Until now, this Court has not taken the opportunity to address this important and recurring issue of an employer's right to discipline strikers for threatening and coercing nonstriking employees. Petitioner has consistently argued that the plain language of the statute and the legislative history show that such threats violate the Section 7 rights of nonstriking employees to refrain from engaging in concerted activity.

Although the current Board Chairman Dotson and Member Hunter have adopted this view, recent cases show that the Board repeatedly reverses its rulings. See, e.g., *Milwaukee Spring*, 265 NLRB No. 28 (January 23, 1984) (reversing its earlier decision and order in the same

case, *Milwaukee Spring I*, 265 NLRB 28 (1982)); *United Technologies Corporation*, 268 NLRB No. 83 (January 19, 1984) (overruling *General American Transportation Corporation*, 228 NLRB 808 (1977)); *Meyers Industries, Inc.*, 268 NLRB No. 73 (January 6, 1984) (overruling *Alleluia Cushion Company*, 221 NLRB 999 (1975)); *Our Way, Inc.*, 268 NLRB No. 61 (December 20, 1983) (overruling *T.R.W., Inc.*, 257 NLRB 442 (1981)); see, especially, *Midland National Life Insurance Company*, 263 NLRB 127 (1982) (overruling *General Knit of California, Inc.*, 239 NLRB 619 (1978) which overruled *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), which overruled *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962)).

3. Judicial economy would best be served by deciding this case. A remand to the Board is not necessary since it does not take special expertise in labor relations to identify threatening and coercive conduct. Furthermore, a remand for redetermination by the Board may not finally settle the issue because strikers Bishop and Hughes, Charging Party Laborers International Union of North America Local 246, or Petitioner Georgia Kraft will have the right to appeal a final order of the Board should it be adverse to their position. 29 U.S.C. § 160(f).

4. If this Court decides to remand to the Board for a determination on the merits, the remand should come only after this court has determined the substantive legal rights raised in the Petition for Certiorari. See, *Bachrodt Chevrolet Company v. NLRB*, 411 U.S. 912 (1973).

For the reasons stated, Petitioner Georgia Kraft respectfully requests that this Court deny the Solicitor General's Motion, retain jurisdiction and render a decision that Section 7 does not give striking employees the right to threaten and intimidate nonstriking employees. This Court should adopt the objective standard of the Third Circuit, *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3rd

Cir. 1977) and specifically rule that William Walker was reasonably coerced in the exercise of his protected Section 7 rights when he was subjected to profane threats by intoxicated strikers made at his home in front of his family.

Respectfully submitted,

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No. 83-103

Office-Supreme Court, U.S.  
FILED

DEC 29 1983

ALEXANDER L. STEVAS,  
CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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WOODKRAFT DIVISION, GEORGIA KRAFT COMPANY,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals  
for the Eleventh Circuit**

---

**BRIEF FOR THE CHAMBER OF COMMERCE OF  
THE UNITED STATES AS AMICUS CURIAE**

---

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### **QUESTION PRESENTED**

Whether Section 7 of the National Labor Relations Act protects striker coercion against a nonstriking employee that, if engaged in by a union or its agents, would violate Section 8(b) (1) (A) of the Act.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-103

---

WOODKRAFT DIVISION, GEORGIA KRAFT COMPANY,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals  
for the Eleventh Circuit**

---

**BRIEF FOR THE CHAMBER OF COMMERCE OF  
THE UNITED STATES AS AMICUS CURIAE**

---

This brief amicus curiae is filed with the written consent of the parties in support of the position of the petitioner. The letters giving consent have been separately filed with the Court.

**INTEREST OF THE AMICUS**

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 200,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The issue before the Court in this case—that of whether the National Labor Relations Board is statutorily empowered to order an employer to forgive coercion by striking employees against nonstriking employees—is of major importance to Chamber members. The right of an employer to continue operating during a strike may be severely undermined if employees who wish to work can be subjected to intimidation with impunity by employees who are on strike. Moreover, the employer who continues to operate and invites employees to return to work has a legitimate interest in protecting employees who accept the invitation.

The Board's current rule, which requires not only striker coercion but coercion of sufficient intensity to satisfy the Board's *post hoc* judgment on the limits of tolerable misconduct, upsets the balance struck by Congress in 1947 when it amended the National Labor Relations Act to require that the right not to strike receive equal status with the right to strike. The Board's rule forgives conduct by striking employees that would be unlawful if committed by the striking union itself, clearly an intolerable result and one that should be reversed.

#### STATEMENT OF THE CASE

Two striking employees, Landis Bishop and Jeffrey A. Hughes, were discharged by the Georgia Kraft Company for misconduct during a strike by the Laborers' Local Union 246.

On the facts as stated by the Board, Bishop and Hughes went to the home of a nonstriking employee, William A. Walker, where the following occurred:

The Administrative Law Judge found that Bishop and Hughes stood outside an open glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker [credited by the administrative law judge] testified that Bishop and Hughes were drunk, cursed, and

said that he, Walker, was "screwing them out of their . . . damn money" by working during the strike. Walker also testified that Bishop said that he would "take care" of Walker if he returned to work—a statement repeated by Hughes. Finally, the Administrative Law Judge found that Walker asked them to leave early in the conversation, but that they "took their time doing so."

*Georgia Kraft Co.*, 258 N.L.R.B. 908, 912-13 (1981).

The administrative law judge concluded from these facts that Bishop and Hughes had "threatened Walker with bodily injury," *id.* at 929, and that their discharge was warranted. *Id.* at 933. The Board disagreed on the basis that the misconduct in question was "an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge." *Id.* at 913. The Board added that the "remark about 'taking care' of Walker was ambiguous, and it was unaccompanied by violence or physical gestures." *Ibid.*

The Eleventh Circuit enforced the Board's order reinstating Bishop and Hughes as employees on the ground that "the Board is entitled to considerable deference in determining the scope of protected activity under section 7 of the Act. . . ." *Georgia Kraft Co. v. NLRB*, 696 F.2d 931, 939 (1983).<sup>1</sup>

## ARGUMENT

The right to strike is a fundamental one under the National Labor Relations Act, but so is the right to refrain from striking. Both rights are given equal status by the language of Section 7 of the Act, 29 U.S.C. § 157, which speaks of the right of employees to engage in "concerted activities" or to "refrain from any or all of such

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<sup>1</sup> In dissent, Circuit Judge Clark stated, 696 F.2d at 940:

I refuse to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home.

activities.”<sup>2</sup> To protect the right to strike, Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it unlawful for an employer to “interfere with, restrain, or coerce” employees in the exercise of their Section 7 rights. To protect the right to refrain from striking, Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), makes it unlawful for a labor organization or its agents to “restrain or coerce” employees in the exercise of their Section 7 rights.

The original 1935 Act protected only the right of employees to act in concert without restraint or coercion by the employer, and was silent on the right of employees to refrain from concerted action without restraint or coercion from the union side. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The Act was amended in 1947 to recognize and protect the right to refrain from concerted activities by expanding the language of Section 7 and by adding Section 8(b)(1)(A). By these amendments, “Congress sought . . . to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal.”<sup>3</sup> *Perry Norvell Co.*, 80 N.L.R.B. 225, 239 (1948), quoted with approval in *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros., Inc.)*, 362 U.S. 274, 291 (1960). The amendments were expressly directed at stopping “coercion which prevented employees not involved in a labor dispute from going to

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<sup>2</sup> The only limitation on the right of employees to refrain from concerted activities is a valid union security clause in a collective bargaining agreement, as noted in Section 7 of the Act. That limitation is inapplicable when employees are striking to obtain a collective bargaining agreement, as was the case here.

<sup>3</sup> In 1947 Congress also added Section 8(c) to the Act which is commonly referred to as the “free speech” proviso. Importantly, that Section guarantees expressions of views, argument or opinion by unions and employers only “if such expression contains *no threat of reprisal or force or promise of benefit.*” 29 U.S.C. 158(c) (emphasis supplied).



work." *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 189 (1967).

Although Section 7 recognizes an unlimited right of employees to refrain from striking, Section 8(b)(1)(A) does not expressly confer Board protection from coercion unless the coercion is performed by "a labor organization or its agents." This "gap" between the policy and enforcement sections of the Act has encouraged the Board to reduce the Section 7 protection of nonstriking employees by developing a scale on which to weigh the severity of the coercion by striking employees. The result has been to extend Section 7 protection to some forms of coercion against non-strikers, the very coercion that Section 7 was amended to eliminate. The Board has accomplished this result, as it did in the present case, by holding that an employer unlawfully coerces its striking employees when it discharges them because they have coerced its nonstriking employees.<sup>4</sup>

In weighing the severity of striker coercion, the Board generally has distinguished between threats and overt acts, protecting the former and proscribing the latter. For example, in *Midwest Solvents, Inc.*, 251 N.L.R.B. 1282 (1980), the Board required the reinstatement of a striking employee who had "threatened a farmer that he would blow up, or burn up, the farmer's combine if the farmer continued to make deliveries." *Id.* at 1282. The farmer continued to make deliveries, without interference. The Board, with the approval of the Tenth Circuit, held that "this isolated threat, unaccompanied by any attempt to interfere with the delivery, is the type of

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<sup>4</sup> The Board has reached this result despite Section 10(c) of the Act, 29 U.S.C. 160(c), which expressly forbids the Board from ordering reinstatement of individuals who are "suspended or discharged for cause." By ignoring Section 10(c) in a strike context, the Board "compel(s) employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of [coercion], which they would not have enjoyed had they remained at work." *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939).

minor misconduct which was in the contemplation of Congress when it provided for the right to strike." *Id.* at 1282, *enfd*, 696 F.2d 763, 767 (10th Cir. 1982).

In contrast to the Eleventh Circuit in the present case and the Tenth Circuit in *Midwest Solvents*, the Third and First Circuits have refused to accept the proposition that Congress intended to prohibit all forms of coercion by unions but protect some forms of coercion by striking employees.

In *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 527-28 (3d Cir. 1977), the court reviewed the inconsistent results reached by earlier striker coercion cases and concluded that the test for unprotected striker conduct should be the same as that for unprotected union conduct:

Rather than focus on either the subjective intent of the striker or the perception of the "victim", we adopt an objective standard to determine whether conduct constitutes a threat sufficiently egregious to justify an employer's refusal to reinstate. In *Local 542, International Union of Operating Eng. v. N.L.R.B.*, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826, 85 S.Ct. 52, 13 L.Ed.2d 35 (1964), this court set forth the test for union coercion and intimidation in violation of Section 8(b)(1)(A):

That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proved effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

*Id.* at 852-853. We believe that this standard which this Circuit has adopted in the closely analogous situation of Section 8(b)(1)(A) violations, is equally applicable to threats and intimidation by individual strikers. [Footnote omitted.]

The First Circuit has joined the Third Circuit in recognizing that "threats are not protected under the Act." *Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977), quoting from *McQuaide*, 552 F.2d at 527. The First Circuit has also agreed with the Third "that an objective standard, denying protection to misconduct that in the circumstances reasonably tends to coerce or intimidate, is appropriate." *Associated Grocers*, 562 F.2d at 1336.

Measured by the objective standard of the Third and First Circuits, which we submit is the only standard consistent with the policies and structure of the Act, the conduct in the present case is clearly coercive. The Board itself grudgingly acknowledged the strikers' conduct to be "verbal intimidation." *Georgia Kraft Co.*, 258 N.L.R.B. at 913. Far from being "isolated," as the Board suggests, the intimidation was aggravated by a premeditated visit to the home of the nonstriking employee which drew his family into the intimidation scene. The legislative history of the 1947 amendments to the Act points to threats against families as a specific abuse that the Congress was determined to proscribe. See *NLRB v. Drivers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, 285-86 (1960). Moreover, the threat to "take care" of the nonstriking employee if he returned to work was not only made, but repeated, during the confrontation at the door of the home. *Georgia Kraft Co.*, 258 N.L.R.B. at 912-13. The Board's dismissal of this threat as "ambiguous" shows how far the Board is willing to go to ignore the obvious.<sup>5</sup> The essential element of coercion is fear.

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<sup>5</sup> The incongruity between the Congressional purpose and the Board's approach is highlighted in *A. Duie Pyle*, 263 N.L.R.B. 744 (1982). There, strikers told a non-striker "your house is on fire" and "if it is not now, it will be Saturday." 263 N.L.R.B. at 744. The Board found the discharged strikers were entitled to reinstatement noting that their threats were not accompanied by "physical acts or gestures." 263 N.L.R.B. at 745. On the other hand, according to the Board, an employer violated Section 8(a)(1) of the Act by threatening "physical violence" when its superintendent told

In the context of the entire confrontation, there can be no doubt that the "we will 'take care' of you" remark would reasonably tend to instill in the nonstriking employee and his family a fear of the consequences if he returned to work. See *Georgia Kraft Co. v. NLRB*, 696 F.2d at 940 ("I refuse to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home") (Judge Clark dissenting).

### CONCLUSION

Nothing in the history of the 1947 amendments to the Act gives support to the Board's conclusion that Congress intended to be more forgiving of striker misconduct than of union misconduct. If the use of fear is a weapon denied to unions by Section 8(b)(1)(A), it is not a weapon entitled to protection when used by striking employees on the ground that no one was actually harmed. The decision of the Eleventh Circuit, which assumes the existence of a discretion to forgive misconduct that the Board does not have, should be reversed.

Respectfully submitted,

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employees "those two [picketers] cannot stop you, and if they think they can, I'll throw both of their asses right out in the street." C. E. Wilkinson & Sons, 255 N.L.R.B. 1367, n.2 (1981).

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No. 83-103

Office-Supreme Court, U.S.  
FILED

DEC 28 1983

ALEXANDER L. STEVAS,  
CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD and LABORERS'  
INTERNATIONAL UNION OF NORTH AMERICA,  
AFL-CIO, LOCAL 246,  
*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit**

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**BRIEF FOR THE NATIONAL RIGHT TO WORK  
LEGAL DEFENSE FOUNDATION AS  
AMICUS CURIAE FOR PETITIONER**

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December 27, 1983

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**INTEREST OF AMICUS CURIAE**

As part of its program, the National Right To Work Legal Defense Foundation provides free legal aid to individual employees who suffer from acts of violence, intimidation, harassment and coercion on account of their decisions to refrain from participating in strike activity. In addition, the Foundation has maintained a computerized listing of newspaper

reports from around the country detailing acts of union violence from 1975 to the present date. This data base<sup>1</sup> reveals that the number of incidents of union violence perpetrated against nonstrikers has risen to an alarming level.

Resolution of the issues in this case will have major ramifications on the rights of nonstriking employees because it will determine the extent to which an employer may protect nonstrikers in the exercise of their rights guaranteed by § 7 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 157.

### PURPOSE OF THIS BRIEF

The Foundation's brief *amicus curiae* addresses the question of whether Congress intended § 7, 29 U.S.C. § 157, to protect acts of intimidation by strikers against nonstrikers when those intimidating acts were unaccompanied by physical gestures.

In addition, the Foundaton's brief will address the ramifications of the NLRB's refusal to countenance the rights of nonstrikers to be free of fear and intimidation.

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<sup>1</sup> Armand J. Thieblot, Jr. and Thomas R. Haggard used the Foundation data base in their recent book entitled, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB*, 1983, University of Pennsylvania Press. This book, especially Chapter 10, was a great resource to amicus in preparing this brief. A copy of the book is being provided to the Clerk of this Court as a reference for the Court.

### SUMMARY OF ARGUMENT

The primary purpose of the Taft-Hartley amendments to the Labor Management Relations Act was to promote an environment in which labor peace and tranquility could be fostered. One of the means chosen to achieve this goal was to grant employees the right to be free of violence, threats and coercion. The change in the language of § 7 and the addition of § 8(b) (1)(A) were intended to guarantee this freedom. In addition, § 10(c) was added to make it clear that employers have the right to discharge employees who participate in violent and coercive acts.

The National Labor Relations Board has been remiss in effectuating this congressional intent. Rather, it has operated with an institutional bias *in favor of* violence against employees who exercise their § 7 rights to refrain from striking. This bias is revealed in the present case where the NLRB has ordered an employer to reinstate striking employees who visited the home of a non-striker and threatened him with bodily injury.

The NLRB's adoption of an "overt act or gesture" standard for determining the reinstatement rights of strikers who threaten non-strikers is unduly mechanistic. This NLRB standard fails to respect the § 7 rights of non-strikers to be free of fear and intimidation.

The "objective" standard adopted by the Third Circuit is a much closer approximation of congressional intent. That standard respects the rights of strikers and non-strikers alike. In addition, adoption of the "objective" standard will tend to promote the predominant goal of the nation's labor laws; the pursuit of labor peace.

## ARGUMENT

### **I. The Taft-Hartley Congress Intended To Protect Non-Striking Employees From Coercive Reprisals By Employees On Strike.**

A reading of the legislative history of the Taft-Hartley Amendments demonstrates how far the NLRB and courts have drifted from the intentions of Congress in passing the LMRA. The amendments were enacted to impose curbs upon various coercive union activities and upon NLRB interpretations of the original National Labor Relations Act which Congress perceived as tending to encourage those coercive activities. Specifically, Congress found that:

For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act. . . .

The employer's plight has likewise not been happy. . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees. . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdiness.<sup>2</sup>

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<sup>2</sup> SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, H.R. REP. NO. 245, 80th Cong., 2d Sess. *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 295-96 (Comm. Print 1974) [hereinafter cited as LEGIS. HIST LMRA].

The means chosen by Congress to alleviate these abuses were: to grant employees the right to *refrain* from union activities<sup>3</sup>; to prohibit unions from coercing employees in their right to refrain from such activities (including, but not limited to, a ban on union violence against employees)<sup>4</sup>; a limitation on the NLRB's power to order employers to reinstate employees who engage in misconduct<sup>5</sup>; and a guarantee of free speech to both employers and employees.<sup>6</sup> The degree to which NLRB interpretations of these provisions varies from congressional intent is striking in the present controversy.

## II. Rulings Of The National Labor Relations Board Tend To Undermine Congressional Intent.

The NLRB has deviated immensely from Congressional intent with regard to interpretation of § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(a). It is clear that Congress intended that provision to outlaw all forms of union violence, *especially during a strike*.<sup>7</sup> Yet, the NLRB has almost always taken a more lenient view towards violence during a strike than on other

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<sup>3</sup> NLRA § 7, 29 U.S.C. § 157.

<sup>4</sup> NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(a).

<sup>5</sup> NLRA § 10(c), 29 U.S.C. § 160(c).

<sup>6</sup> NLRA § 8(c), 29 U.S.C. § 158(c).

<sup>7</sup> See 93 CONG. REC. 6540 (1947) (rem. of Rep. Hartley) *reprinted in* LEGIS. HIST LMRA, 1947, at 881-83. *See also* 93 CONG. REC. at 4563 (rem. of Sen. Taft), 6548 (rem. of Rep. Halleck), LEGIS. HIST LMRA at 1208, 897-98.



occasions.<sup>8</sup> Furthermore, Congress had a broad conception of violence in mind, including threats and harassment as well as outright violent acts.<sup>9</sup> Yet, the NLRB has consistently allowed certain kinds of violence during a strike to occur, paying lip service to the illegality of those acts but forbidding employers from exercising their statutory and common law right to discharge employees who have engaged in those kinds of violence.<sup>10</sup> This in spite of the fact that Congress specifically intended that "[a]ny employees participating in (violence, threats, harassment) may certainly be discharged for cause and are not entitled to reinstatement."<sup>11</sup>

The NLRB has, in effect, ignored the amendment to § 10(c) which provides "... no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause."<sup>12</sup> In spite of this language, the NLRB still retains the attitude that:

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<sup>8</sup> *Coronet Casuals, Inc.*, 207 N.L.R.B. 304 (1973), *Terry Coach Industries*, 166 N.L.R.B. 560, *enfd.*, 411 F.2d 612 (9th Cir. 1969).

<sup>9</sup> 93 CONG. REC. 4142, 4563 (rem. of Sen. Taft) LEGIS. HIST LMRA at 1025, 1208; S. REP. NO. 105, 80th Cong., 1st Sess. 50 (1947) reprinted in LEGIS. HIST LMRA, 456.

<sup>10</sup> *Star Meat Co. v. NLRB*, 105 L.R.R.M. 3144 (6th Cir. 1980); *Southern Fla. Hotel & Motel Ass'n.*, 245 N.L.R.B. 561 (1980); *Limestone Apparel Corp.*, 225 N.L.R.B. 722 (1981); *Firestone Tire & Rubber Co.*, 187 N.L.R.B. 54 (1970).

<sup>11</sup> 93 CONG. REC. 7495, LEGIS. HIST LMRA, 544, 546 and 912, and [1947] U.S. CODE CONG. & AD NEWS 1135, 1164-65.

<sup>12</sup> 29 U.S.C. § 160(c).

The Board and courts have consistently ruled that not every act of misconduct committed during a strike deprives an employee of the Act's protection. Although an employee may have engaged in misconduct, he or she may not be deprived of reinstatement rights absent a showing that the conduct was so violent or of such a serious nature as to render an employee unfit for future service. (Footnote omitted).

*Southern Fla. Hotel & Motel Ass'n*, 245 N.L.R.B. 561, 564 (1980).

This attitude that misconduct during a strike is, somehow, more protected than at other times is in stark contrast to the congressional intent that the §10(c) limitations on the NLRB's reinstatement power "applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity."<sup>13</sup>

It is indisputably clear that Congress intended *all* acts of violence by employees, during a strike or not, to take employees out of the protection of the Act and, thus, subject employees to discharge by the employer for cause. This absolute loss of immunity is subject to only two exceptions. First, the "free speech" provisions of § 8(c), 29 U.S.C. § 158(c), establish a limited right of employees to engage in harsh or even obscene language, so long as that language is not a threat. Second, if the General Counsel can demonstrate that the employee's misconduct was merely a pretext by the employer for ridding itself

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<sup>13</sup> H.REP. No. 510, 80th Cong., 1st Sess., reprinted in LEGIS. HIST LMRA at 543, [1947] U.S. CODE CONG. & AD. NEWS at 1145.

of a pro-union employee, then relief under § 8(a)(3) can be had.<sup>14</sup>

However, the NLRB has subverted this congressional intent by framing the issue and allotting the burden of proof in a manner that presumes that employees are immune from discharge for strike misconduct on account of § 8(a)(1), 29 U.S.C. § 158(a)(1) unless the employer can demonstrate that the employee's misconduct was sufficiently egregious to "remove him from the protection of the Act."<sup>15</sup> The cases that originally enunciated this "minor violence test"<sup>16</sup> were expressly criticized by the House of Representatives.<sup>17</sup> After calling the NLRB's reasoning "asinine", the House Report went on to note:

The change made in Section 10(E) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to . . . engage in incivilities and other disorders and misconduct.

LEGIS. HIST LMRA at 333.

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<sup>14</sup> 29 U.S.C. § 158(a)(3).

<sup>15</sup> *Star Meat Co.*, *supra* p. 6, at 105 L.R.R.M. 3145.

<sup>16</sup> *Berkshire Knitting Mills*, 46 N.L.R.B. 955 (1943); *Wyman-Gordon Co.*, 62 N.L.R.B. 561 (1945).

<sup>17</sup> H.R.REP. No. 510, 80th Cong., 1st Sess. *reprinted in* LEG. HIST LMRA 543; H.R.REP. No. 245, 80th Cong., 2nd Sess. *reprinted in* LEGIS. HIST LMRA at 333.

### III. In The Current Controversy, NLRB Subversion Of Congressional Intent Is Apparent.

The NLRB's subversion of congressional intent is especially evident in "threat" cases like the one at issue here where two employees visited the home of a non-striker and confronted him (along with his pregnant wife and child) with obscene language and threats to "take care of" the nonstriker if he returned to work.<sup>18</sup> The Administrative Law Judge found that the strikers had threatened the nonstriker with bodily injury. On review, the NLRB decided that the threat to "take care of" the nonstriker was "ambiguous" and that since the threats were "unaccompanied by violence or physical gestures," the Board considered them an "isolated incident of verbal harassment,"<sup>19</sup> and, thus, ordered the employer to reinstate them. It is significant to note that neither the Administrative Law Judge nor the NLRB found that the employer had shown anti-union animus sufficient to bring § 8(a)(3), 29 U.S.C. § 158(a)(3) into play.

Amicus submits that this "overt acts" test is unduly mechanistic and tends to *encourage* harassment of non-strikers by strikers. In effect, the Board's policy of refusing to allow the discharge of a striker on account of threatening statements (absent overt acts) to non-strikers provides a "roadmap" which strikers may follow to pursue their illegal goal (of coercing non-strikers in the exercise of their right to refrain from concerted strike activity), yet escape the threat of lawful discharge. Moreover, in the case

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<sup>18</sup> *Georgia Kraft Co.*, 258 N.L.R.B. No. 121, Appendix p. A66.

<sup>19</sup> *Id.*, Appendix p. A40.

of a non-striker who has been threatened, the "overt acts" test fails to countenance *his* § 7 right to be free of violence and harassment.

While it could be argued that § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(a), was intended as a non-striker's remedy to striker coercion, that remedy, by definition, cannot apply to *individual* acts of misconduct. Besides, the agency problem may be insurmountable and injunctive relief is too little and too late. Most importantly, the deterrent effect of an employer's threat of discharge is a much more potent protection for the non-striking employee.

It is made repeatedly clear in the legislative history that Congress considered coercive conduct by individuals, which would be an unfair labor practice if committed by a union, to be just cause for discharge of an individual participant.<sup>20</sup> In its discussion of the amendments to §§ 7 and 8(b)(1)<sup>21</sup>, the House Conference Report stated ". . . obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act."<sup>22</sup> As if to emphasize this point, the Report later states "an employee who is discharged for participating in (8(b)(1) violations) will not, . . . be entitled to reinstatement."<sup>23</sup>

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<sup>20</sup> 93 CONG. REC. at 7495, LEGIS. HIST LMRA at 912, *supra* note 2 at 544, 546 and [1947] U.S. CODE CONG. & AD. NEWS 1135, 1164-65.

<sup>21</sup> 29 U.S.C. §§ 157 and 158(b)(1).

<sup>22</sup> H.R.REP. No. 510, 80th Cong. 1st Sess. (1947) *reprinted at* LEGIS. HIST LMRA at 544.

<sup>23</sup> *Id.* at 546.

The only existing test for determining whether a misbehaving employee has overstepped the bounds of § 7 that comports with this principle is the "objective standard" enunciated by the Third Circuit Court of Appeals.<sup>24</sup> In that case, verbal threats such as "we'll get you," and "you're going to get yours," were made to a non-striking employee by striking employees. *Id.* at 526. The employer denied reinstatement to the striking employees and the union filed unfair labor practice charges alleging violation of §§ 8(a)(1) and (3). The case was before the Third Circuit Court of Appeals on the Board's petition for enforcement of its order issued against the employer.

The Board had applied its "physical acts or gestures" standard, finding that the strikers "did not engage in conduct sufficiently egregious to deprive them of the protection of the Act" because the verbal threats were "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to their words sufficient to warrant finding that they should not be reinstated to their jobs at the strike's conclusion." *Id.* at 527.

The Third Circuit stated flatly that "the Board applied an erroneous standard." *Id.* The court explained that while recognizing "that it is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights'", it did not believe that an employer must countenance conduct that amounts to intimidation and threats of bodily harm. *Id.* "Threats are not

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<sup>24</sup> *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977).

protected conduct under the Act, and we fail to see how a threat acquires protected status simply because it is unaccompanied by physical acts or gestures." (Footnotes omitted). *Id.*

The court chose instead to adopt the same standard it had used in cases of union coercion and intimidation,<sup>25</sup> believing that "this standard which this Circuit has adopted in the closely analogous situation of § 8 (b)(1)(A) violations, is equally applicable to threats and intimidation by individual strikers." *Id.* at 528.

The objective standard was stated as follows:

That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. *The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.*

*Id.* (Emphasis added).

Further support for the objective standard is found in *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977). The employer petitioned for review of the Board's order that striking employees who "verbally threatened strikebreakers"<sup>26</sup>

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<sup>25</sup> See *Local 542, Int. Union of Oper. Eng. v. NLRB*, 328 F.2d 850 (3d Cir. 1964).

<sup>26</sup> One striker approached three job applicants in the presence of forty to fifty pickets and told them not to go through the picket line if they "valued their lives." *Associated Grocers*, 562 F.2d at 1336.



and who "in an intimidating fashion, followed a supervisor home in an auto at night" should be reinstated to their pre-strike positions with back pay. *Id.* at 1335. In ordering reinstatement, the ALJ (affirmed by the Board) had applied the Board's "overt acts" standard. While recognizing that the Board is entitled to considerable deference in its determination of the scope of § 7, the First Circuit nevertheless agreed with the Third Circuit in *McQuaide* that the Board's formulation was "too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity" in that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." *Id.* at 1336.

The First Circuit ultimately declared a complete departure from the Board standard, stating that "[w]hile the presence of physical gestures accompanying a verbal threat may be probative of the threat's seriousness, we think the Board commits legal error insofar as it hinges the protections of § 7, entirely on the presence or absence of physical gestures." *Id.*

#### **IV. The Third Circuit's Objective Test Is Superior To The NLRB's In That It More Closely Approximates Congressional Intent.**

In *McQuaide, supra*, the Third Circuit also rejected the other two prevalent tests of whether threats constitute sufficient misconduct to remove an employee from the protections of § 7. Those tests examine either the subjective "intent" of the discharged

striker<sup>27</sup> or the subjective "effect" upon the threatened employee.<sup>28</sup>

Neither of these subjective tests comports with the congressional intent that coercive conduct which would be an unfair labor practice if engaged in by a union is also to be considered unprotected insofar as the individual participants are concerned.<sup>29</sup> The subjective "intent" test is not sufficiently protective of the rights of employee victims of violence. It is always difficult to prove intent, especially that of another individual. In the context of verbal threats, the burden of proving the intent of the threatmaker becomes all the more difficult, thus diminishing the deterrent effect of a threat of discharge. The subjective "effect" test is, likewise, unfair to the victims of threats because it does not countenance their right to be free of coercion. It only affords nonstrikers the

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<sup>27</sup> See *NLRB v. Pepsi-Cola Co.*, 496 F.2d 226 (4th Cir. 1974) (striker approached prospective job-seeker and said "I know where you live, and if you go in there to work, I'll come looking for you." The court said that while "[r]ecognizing that some confrontations between strikers and nonstrikers are inevitable, we have drawn the line at conduct that is intended to threaten or intimidate nonstrikers. . . . [the striker's] words crossed the line from persuasion to threats and intimidation.")

<sup>28</sup> See *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841 (8th Cir. 1964) (strikers told nonstriking employee that he "had better have good window breakage for his car" and that if he didn't quit work "the rest of the Union guys would get him." This was found not to be protected activity in that it was "sufficiently obstructive and threatening to place [the nonstriking employee] in fear of bodily harm and to cow him to the extent that he stayed away from his job for five weeks.")

<sup>29</sup> See nn. 20-23 and accompanying text.

right to be free of *very effective* coercion. This test, like the NLRB's "overt acts" test fails to give due regard to the right of nonstrikers to be free of fear.

It is established in tort law that verbal threats alone can result in serious injury in the form of mental distress. The Board standard fails to recognize that intimidating words, whether or not they are accompanied by physical gestures, may restrict a nonstriking employee from fully exercising *his* rights under § 7.<sup>30</sup> Section 7 is obviously designed to establish and protect the rights of *both* striking and nonstriking employees. The Board unduly alters the balance of these potentially conflicting rights when it considers verbal threats to be a permissible means by which to assist labor organizations. If the purpose of § 7 is to be effectuated, an employee exercising his right to strike cannot, by doing so, infringe upon another employee's right to *refrain* from union-related activity. The right to refrain should include

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<sup>30</sup> The Georgia legislature has obviously recognized this possibility: see Georgia Code § 54-801 (It shall be unlawful for any person acting alone or in concert with one or more persons, by the use of force, intimidation, violence, *or threats thereof*, to prevent or attempt to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer, or from entering or leaving any place of employment of such employer) and § 54-804 (It shall be unlawful for any person, acting alone or in concert with one or more other persons, to compel or attempt to compel any person to join or refrain from joining any labor organization or to strike or *refrain from striking against his will*, by any *threatened* or actual interference with his person, immediate family, or physical property, or by any *threatened* or actual interference with the pursuit of lawful employment by such person, or by his immediate family) (emphasis added).

the right to refrain with peace of mind and, if not without harassment in the form of heckling or verbal abuse, at least without threats to safety or even life. As the agency charged with the primary responsibility of maintaining labor peace, the Board has a duty to interpret § 7 in such a way that *all* employees' rights are protected. By endorsing a "physical acts" standard of misconduct, the Board is tipping the balance in favor of striking employees at the expense of nonstriking employees.

### CONCLUSION

The only standard of analysis that effectively promotes this balance is the "objective test" advocated by the First and Third Circuits.

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December 27, 1983

DEC 29 1983

ALEXANDER L. STEVAS,  
~~CLERK~~

No. 83-103

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**In the Supreme Court of the United States**

**October Term, 1983**

**WOODKRAFT DIVISION, GEORGIA KRAFT CO.,**

*Petitioner,*

**vs.**

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**BRIEF OF AMICI CURIAE, MID-CONTINENT  
SMALL BUSINESS UNITED, AND GULF AND  
GREAT PLAINS LEGAL FOUNDATION IN  
SUPPORT OF PETITIONER**

---

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**December 29, 1983**

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No. 83-103

**In the Supreme Court of the United States**

**October Term, 1983**

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WOODKRAFT DIVISION, GEORGIA KRAFT CO.,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**BRIEF OF AMICI CURIAE, MID-CONTINENT  
SMALL BUSINESS UNITED, AND GULF AND  
GREAT PLAINS LEGAL FOUNDATION IN  
SUPPORT OF PETITIONER**

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**INTEREST OF AMICI CURIAE**

Amicus Mid-Continent Small Business United, a not-for-profit organization, has a strong interest in the outcome of this case. The organization represents small businesses in a four-state area including Iowa, Kansas, Nebraska, and Missouri and is affiliated with Small Business United which is a national organization. Approximately

five hundred small businesses constitute the membership of Mid-Continent Small Business United. The purpose of the organization is to provide a means for its members to speak with a unified voice in support of the free enterprise system. The member small businesses have a strong concern for protecting management and labor from criminal activity, as well as ensuring that the National Labor Relations Act is not construed to protect otherwise criminal activity.

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the preservation of the free enterprise system, the protection of the liberties and constitutional rights of citizens, and a rational system of criminal justice. The Foundation has appeared as amicus curiae in a number of cases before this Court, including cases relating to labor law.

## SUMMARY OF ARGUMENT

The narrow question now facing this Court is whether it is proper under the Labor Management Relations Act (29 U.S.C.A. § 141 et seq. (West, 1973)), for a company to discharge two union employees on strike who visited the home of a third non-striking employee at night and threatened the non-striking employee in front of his child and pregnant wife.

Mid-Continent Small Business United and Gulf and Great Plains Legal Foundation are strongly opposed to this Court placing its stamp of approval on conduct of this nature. Violence has played no small part in the continuing struggle between labor and management. Legal reports from the American labor scene present depressing evidence of how economic conflicts between labor unions and management have too often degenerated into acts of physical force and coercion.

Conduct such as that described by the facts of this case was never intended to be protected by the creators of the Labor Management Relations Act. Conduct of that nature was considered reprehensible by the legislators who adopted this statute and its construction must not be stretched to protect from discharge those who utter such threatening statements.

The conduct of the two striking employees in this case is deplorable. Conduct that is threatening in nature not only to the non-striking employee but to his family violates the sanctity of the home and must not be tolerated.

## ARGUMENT

### **I. THE LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT AND THE LABOR MANAGEMENT RELATIONS ACT CLEARLY DEMONSTRATES THAT THESE STATUTES WERE ENACTED TO REDUCE INDUSTRIAL STRIFE AND WERE IN NO WAY INTENDED TO PROTECT VIOLENCE OR THREATS THEREOF.**

Prior to the passage of the National Labor Relations Act (29 U.S.C.A. §§ 157-166 (West, 1973)), the American labor scene was plagued by acts of violence perpetrated by, or in the name of, labor unions. See Haggard, *Labor Union Violence As an Unfair Labor Practice*, 34 S.C. L. Rev. 273 (1972). In an attempt to resolve the strife between labor and management, Congress responded with the passage of the National Labor Relations Act, often referred to as the Wagner Act after its principal author. This Act codified many of the rights asserted by labor and proscribed employer interference with those rights. There were no corresponding union unfair labor practices.

Although the express purpose of the National Labor Relations Act was to end strikes and other forms of industrial strife (National Labor Relations Act, Public Law No. 74-198, 49 Stat. 449 § 1 (1935)), that purpose was not fully served by the legislation. The number and intensity of strikes continued as before. The Bureau of Labor Statistics' work stoppage figures fail to show any significant decline in either the average duration or percentage of workers involved in the ten year period following passage of the National Labor Relations Act.

The number and intensity of confrontations in 1945 and 1946 led to a growing public sentiment that perhaps

too much power had been granted the unions by the National Labor Relations Act and that a similar legal constraint on unions would be necessary to restore a proper balance and insure some degree of industrial order. During the years 1936 through 1944, the average number of workers involved in work stoppages was 4.0% whereas the average percentage during 1945-46 more than doubled to 9.3%. U.S. Dept. of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 508 (1978). In 1947, Congress enacted the Labor Management Relations Act (LMRA), also referred to as the Taft-Hartley Act. This Act amended the National Labor Relations Act in several aspects. Most importantly for this discussion, the LMRA enumerated a list of *union unfair labor practices*. In that Act, Congress expressed the concern over the many reported instances of actual physical violence and intimidation that labor union supporters had directed against both employers and employees not sympathetic to the union cause. See Labor Management Relations Act, Ch. 120, Pub. L. No. 101 (1947) (codified at 29 U.S.C.A. §§ 141-187 (West, 1973)); see also Legislative History of the Labor Management Relations Act of 1947, at 456, 882, 898, 905, 912, 1025, 1207-08 [hereinafter cited as Legis. Hist. LMRA].

The House Committee report on an early version of what was to eventually become the Labor Management Relations Act succinctly expresses the Congressmen's concern for labor union violence against employees and employers alike:

For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American working man has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act . . . .

The employer's plight has likewise not been happy . . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees . . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism. *Id.* at 295-296.

The original House version of the Labor Management Relations Act made it an unfair labor practice for any employee, "by intimidating practices" to interfere with the Section 7 rights of other employees. *Legis. Hist. LMRA* at 52. In addition, the original House version made it an unfair labor practice for a union to "interfere with, restrain, or coerce individuals in the exercise of rights guaranteed in Section 7(b)." *Id.* at 52-53. The section defining "unlawful concerted activities" specifically described the kinds of conduct which those who created the statute intended to prohibit:

By the use of force or violence or *threats thereof*, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or *threats thereof*, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or *besetting the home of any individual* in connection with any labor dispute. *Id.* at 78. (emphasis added).



Earlier discussions of this legislation in the Senate as well clearly demonstrate that violence and threats thereof were condemned by this legislation. Four members of the Senate committee which introduced the bill stated in their Supplemental Views attached to the Senate Report, that "[t]he Committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families . . . ." *Id.* at 456. Accordingly, a floor amendment was introduced adding provisions similar to the House version of this bill, making it an unfair labor practice for a labor organization "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7." *Id.* at 1018.

The debate on this floor amendment was extensive and is important for this discussion. Among other things, the proponents of this amendment gave some specific examples of the kinds of union conduct they intended to prohibit. The use or threatened use of ordinary physical violence as a means of forcing employees to support the union was frequently cited as an evil to which the amendment was directed. One Senator referred to a letter from a small employer in New York who stated that on several occasions gangs of union men were sent into his plant. They pushed his employees around and threatened them if they did not join the union. *Id.* at 1018. The Senator also referred to a case where the union "threatened, jostled, and beat up one of the employees as he was going to work." *Id.* at 1019. There are many other references to threats, physical violence, and "goon squad" tactics spread throughout the debates. *Id.* at 1020, 1024, 1025, 1028, 1031.

Out of this debate came the Congressional response to this problem of union violence. First, union violence against employees was made an unfair labor practice.

Section 7 of the Taft-Hartley Act was expanded to include a right to *refrain* from union activities, and Section 8(b)(1)(A) was added to prohibit unions from restraining or coercing employees in the exercise of that right. This change was made, perhaps exclusively, for the purpose of outlawing "mass picketing and the use of violence in the conduct of a strike." 93 Cong. Record 6540 (1947) (statement of Rep. Hartley); *Id.* at 4563 (statement of Sen. Taft); *Id.* at 6548 (statement of Rep. Halleck). Furthermore, Congress had a very broad concept of violence in mind when it enacted this statute. The legislative history clearly shows that this section of the Act was intended to include threats. As Senator Taft stated in reference to the Labor Management Relations Act then pending before Congress:

"I can see nothing in the pending measure which . . . would in some way outlaw strikes. *It would outlaw threats against employees.* It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. *All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.*" 93 Cong. Rec. 4563 (1947) reprinted in Legis. Hist. LMRA at 1207. (emphasis added). See also 93 Cong. Rec. 4142 (1947).

Not only were threats included in this concept of "violence" but various kinds of picket line harassment and abuse were also included. S. Rep. No. 105, 80th Cong., First Sess. 50 (1947); Legis. Hist. LMRA at 456.

Equally clear is the fact that Congress intended to bind unions and individual members thereof to the same definition of "unfair labor practices" as was already in

effect for management. In referring to the Labor Management Relations Act then pending before Congress, Senator Taft remarked:

"This amendment proposes to say that it shall also be an unfair labor practice for an employee organization, a union or its agents, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

The language is perfectly clear . . . . [An employer] cannot go to an employee and threaten physical violence . . . . Now it is proposed that the union be bound in the same way. What could be more reasonable than that?" 93 Cong. Rec. 4135 (1947), reprinted in Legis. Hist. LMRA p. 1025.

In emphasizing the intention to bind employers and unions to the same rules, Senator Taft went on to state:

"Why should a union be able to go to an employee and threaten violence if he does not join the union? . . . What possible distinction can there be between an unfair labor practice of that kind on the part of an employer and a similar practice on the part of a union? . . . We know that men have been threatened. There have been many cases in which unions have threatened men or their wives . . . . It seems to me perfectly clear that that is a reprehensible practice, and one which is just as reprehensible and just as limiting on the rights of the employees guaranteed by the Wagner Act as would be an unfair labor practice on the part of employers." *Id.*

The legislative history repeatedly makes it clear that "any employees participating in these activities may certainly be discharged for cause and are not entitled to reinstatement." 93 Cong. Rec. at 7495. See also H.R. Rep.

No. 510, 93rd Cong., Second Sess. 40, 42 (1947), *reprinted in* Legis. Hist. LMRA, 544, 546, and (1947) U. S. Code Cong. and Ad. News, 1135, 1164-65.

Congress responded to the problem of labor violence in a second way—by curtailing the National Labor Relations Board's power to order reinstatement. The House version of what was to become the Taft-Hartley Act specifically exempted from the protections of Section 7 all conduct "constituting unfair labor practices under Section 8(b), unlawful concerted activities under Section 12, or violations of collective bargaining agreements." H.R. 3020, 80th Cong., 1st Sess. 19 (1947), *reprinted in* Legis. Hist. LMRA at 176. Section 12, defined unlawful concerted activities as "the use of force or violence or threats thereof" in connection with strikes and picketing. H.R. Rep. No. 510, 93rd Cong. Second Sess. 47 (1947), *reprinted in* Legis. Hist. LMRA at 204-05. (emphasis added).

As it passed the House, Section 10(c) of the bill was amended to curtail the Board's power to order reinstatement. This section stated that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, unless the weight of the evidence shows that such individual was not suspended or discharged for cause". H.R. 3020, 80th Cong., 1st Sess. 19 (1947), *reprinted in* Legis. Hist. LMRA at 196. The House Report noted that "[t]he change made in Section 10(e) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plant, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. 245, 80th Cong., 1st Sess. (1947)

at 42, reprinted in Legis. Hist. LMRA at 333. (emphasis added). Obviously, the authors of the House Report felt that all such activity was more than adequate grounds for discharge.

The legislative history of the Labor Management Relations Act is clear. Threats of physical violence are not protected concerted activities. The legislative history speaks for itself. Employees who engage in such reprehensible conduct and who are discharged because of it are not entitled to reinstatement.

**II. THE STANDARD ADOPTED BY THE THIRD CIRCUIT IN McQUAIDE AND THE FIRST CIRCUIT IN ASSOCIATED GROCERS OF NEW ENGLAND IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT IN REFUSING TO PROTECT THREATS OF PHYSICAL VIOLENCE FROM UNIONS OR UNION MEMBERS AS WELL AS FROM MANAGEMENT AND SHOULD BE ACCEPTED AS THE PROPER STANDARD OF REVIEW BY THIS COURT.**

Section 7 of the Labor Management Relations Act gives employees "the right to assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." (29 U.S.C.A. § 157 (West, 1973)). (emphasis added).

On its face, the language of Section 7 would seem broad enough to cover nearly any kind of employee activity, "from the peaceful submission of grievances to blowing up the plant." Haggard, *Picket Line and Strike Violence as Grounds for Discharge*, 18 Hous. L. Rev. 423

(March 1981). However, through reading the legislative history and examining the cases construing this Act, it becomes obvious that not all conduct which satisfies the literal words of the statute is necessarily "protected" against every type of employer response. "[B]oth the Board and the courts have recognized that not every form of activity that falls within the letter of this provision is protected." *Elk Lumber Co.*, 91 N.L.R.B. 333, 336-37 (1950).

The present controversy pertains to the use of threats made at night by striking employees at the home of a non-striking employee. The question as to whether conduct of this nature is sanctioned by § 7 of the National Labor Relations Act was most recently answered by the United States Court of Appeals for the Third Circuit. In *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977), the court was faced with a similar set of circumstances as that in the case at bar. The facts of *McQuaide* indicate that a striking employee threatened non-striking employees several times. This conduct resulted in the discharge of the striking employee. On one occasion a non-striking delivery employee was warned by the striker that he would "get him." The striker later threatened to "knock the god-d . . . n s . . . out of [a non-striking truck driver]" and told yet another driver "Scab, you're going to get yours." *Id.* at 528. In attempting to protect the striker from discharge, the NLRB stated that threats of violence without some overt act of physical violence were insufficient to sustain discharge of the employee.

In denying reinstatement to the discharged striker, the Third Circuit expressly rejected the NLRB's "overt acts" requirement. The court noted that "threats are not protected conduct under the Act, and we fail to see how a

threat acquires protected status simply because it is unaccompanied by physical acts or gestures." *Id.* at 527.

The Court adopted "an objective standard to determine whether conduct constitutes a threat sufficiently egregious to justify an employer's refusal to reinstate," *Id.*, namely "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Id.* at 528, quoting *Local 542, International Union of Operating Engineers v. NLRB*, 328 F.2d 850, 852 (3rd Cir. 1964), cert. denied, 379 U.S. 826 (1964).

The standard set out in *McQuaide* for individual strike participants was simply the same standard previously used by the Third Circuit in determining whether conduct by a union rose to the level of restraint or coercion in violation of Section 8(b)(1)(A). This approach is consistent with the legislative history of the Labor Management Relations Act. Coercive conduct which would be an unfair labor practice for management or a union to engage in is also to be considered unprotected insofar as the individual participants are concerned.

There is little doubt that the NLRB would have found it to be an unfair labor practice if, on the facts of this case, a member of management rather than an individual union member had visited the home of a striking employee and threatened him. Why then is there a refusal to apply the same rules to the individual union member? This refusal is a clear violation of the purpose for which the Labor Management Relations Act was intended.

In addition to the Third Circuit, the First Circuit has applied the rules pertaining to unfair labor practices with equal force to unions, individual union members and management alike. In *Associated Grocers of New England v.*



NLRB, strikers whose reinstatement was at issue had threatened the lives of three job applicants. 562 F.2d 1333 (1st Cir. 1977). At least one of the three construed the threat as a serious threat on his life and did not apply for work. Following the approach of *McQuaide*, the Court of Appeals again rejected the Board's "overt acts" test and found that in the circumstances of the case, the conduct and words would reasonably tend to coerce or intimidate, and that they were therefore unprotected. *Id.* at 1337.

By reviewing the legislative history, it is obvious that the Congressmen who enacted the Labor Management Relations Act did not intend to lend protection to threatening statements uttered to coerce employees into joining union activities. Even the NLRB has determined that threatening statements uttered in a violent context leave the speaker unprotected from unfair labor practice charges. The following is a representative sampling of statements that have been found to restrain or coerce:

"While no heads were broken last time . . . things could be different now." *United Sugar Workers Union Local 9 (American Sugar Co.)*, 146 N.L.R.B. 154, 159 (1964).

"I hate to think what would happen if you walked in there." *United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.)*, 81 N.L.R.B. 886, 906 (1949).

"You better not try it [cross the picket line] or there will be trouble." *Id.* at 900.

"There may be trouble later." *United Mine Workers (Union Supply Co.)*, 90 N.L.R.B. 436, 438 (1950).

"Lay off the union business or your ulcers will be bothering you." *Checker Taxi Co.*, 131 N.L.R.B. 611, 620 (1961), enforced in part, 99 L.L.R.M. 2903 (D.C. Cir. 1978).

"We'll get you." *Street Employees (Plymouth & Brockton Street Railway Co.)*, 142 N.L.R.B. 174, 179 (1963).

"We'll take care of you." *Id.*

"We'll get you sooner or later." *Perry Norvell Co.*, 80 N.L.R.B. 225, 238 (1948).

"We'll fix her so she won't work permanently." *Amalgamated Meat Cutters (Iowa Beef Processors, Inc.)*, 233 N.L.R.B. 839, 843 (1977).

By comparison the threats presently at issue to the non-striking employee that he was "screwing them out of their godd . . . n money by working during the strike" and that they would "take care of " the non-striker, seem merely to be statements to add to the list of threats above which were determined to be coercive and intimidating. Indeed the words "We'll take care of you" have already been found to be sufficiently threatening and coercive to warrant the finding of an unfair labor practice. *Street Employees (Plymouth & Brockton Street Railway Co.)*, 142 N.L.R.B. 174, 179 (1963).

The facts of the present case are such that the threats took on an extra aura of intimidation. First, the threats were made on the doorstep of the non-striking employee's home. Most cases dealing with threats have arisen on the picket line. Second, the threats were issued at night. The bulk of cases concerning threats have dealt with threats issued in daylight hours. Third, the threats came from not one, but two employees. Fourth, the striking employees were intoxicated. Fifth, the threats were made in the presence of the non-striker's child and pregnant wife. The issuance of a threat is a serious matter when only the parties to the dispute are present. The threat takes on

decidedly sinister tones when issued in the presence of innocent third party family members.

It is impossible to assume that the drafters of the National Labor Relations Act or the Labor-Management Relations Act intended to provide affirmative protection to acts of coercion and intimidation as set forth in the facts of this case. It cannot be assumed that conduct of this nature should be protected even when committed in connection with an otherwise legitimate strike.

It is beyond comprehension that the National Labor Relations Board and a federal appellate court would stand in defense of threatening conduct which makes a man and his family feel unsafe in their own home. This is especially true when the only issue is whether the employer may terminate his working and financial relationship with those who engage in intimidating and coercive tactics.

Despite protestations of the Board that their decision should not be construed as condoning even minor forms of coercion or violence, their actions speak louder than their words. It cannot be denied that the order reinstating the workers has a legitimizing effect on strike violence. There is reason for grave concern that eventually threats of this nature will be considered an acceptable method by which striking employees may gain support for their cause.

To avoid these results, this Court must strongly reaffirm the liberty of the employer to terminate employees who engage in threatening and intimidating strike tactics.

## CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed, and thereby affirm the discharge of the striking employees.

Respectfully submitted,

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